261 N.C. App.—No. 2 Pages 118-310

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

APRIL 27, 2020

MAILING ADDRESS: The Judicial Department
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OF
NORTH CAROLINA

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[1]Sworn in 30 April 2019. [2]Sworn in 26 April 2019. [3]Resigned 24 March 2019. [4]Retired 1 April 2019.

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COURT OF APPEALS

CASES REPORTED

FILED 4 SEPTEMBER 2018

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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ABUSE OF PROCESS

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SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

FRANCIS X. De LUCA and THE NEW HANOVER COUNTY BOARD OF EDUCATION, Plaintiffs

v.

JOSH STEIN, in his capacity as Attorney General of the State of North Carolina, Defendant

and

NORTH CAROLINA COASTAL FEDERATION and SOUND RIVERS, INC., Intervenors

No. COA17-1374

Filed 4 September 2018

1. Jurisdiction—standing—order regarding standing not appealed—merits considered on appeal

The Court of Appeals considered the merits of an argument that plaintiffs lacked standing in a lawsuit against the attorney general—even though defendant parties did not appeal from the trial court's earlier order concluding plaintiffs had standing—because standing is an issue of subject matter jurisdiction and can be raised at any time.

2. Jurisdiction—standing—taxpayer—funds for public education—allegations of basis for standing

A North Carolina citizen lacked standing to bring an action against the state attorney general alleging a violation of the state constitution for failure to use certain funds for public education, where that citizen failed to allege any basis upon which he could sue solely in his capacity as a taxpayer.

3. Jurisdiction—standing—county board of education—intended beneficiary of funds

A county board of education had standing to bring an action against the N.C. attorney general alleging a violation of the state constitution for failure to use certain funds for public education, because, viewing the allegations in the light most favorable to the board of education, the board would be an intended beneficiary of the funds at issue.

4. Constitutional Law—North Carolina—funding of public education—civil penalties—punitive or in lieu of enforcement

The trial court erred by concluding that, as a matter of law, payments specified in an agreement between the attorney general and a meat-processing company (following the contamination of water supplies by swine waste lagoons) were not civil penalties required to fund public education pursuant to the state constitution. Genuine

issues of material fact existed as to whether the payments under the agreement were intended to be punitive or in lieu of enforcement actions asserted against the company and its subsidiaries.

Judge BRYANT dissenting.

Appeal by plaintiff from order entered 12 October 2017 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 20 June 2018.

Stam Law Firm, PLLC, by Paul Stam and Amy C. O'Neal, for plaintiff-appellants.

Attorney General Joshua H. Stein, by Special Deputy Attorneys General Marc Bernstein and Jennie Wilhelm Hauser, for defendant-appellee Joshua H. Stein in his capacity as Attorney General of the State of North Carolina.

Southern Environmental Law Center, by Mary Maclean Asbill, Brooks Rainey Pearson and Blakely E. Hildebrand, for intervenor-appellees North Carolina Coastal Federation and Sound Rivers, Inc.

Tharrington Smith, L.L.P., by Deborah R. Stagner and Lindsay Vance Smith, for amicus curiae North Carolina School Boards Association.

TYSON, Judge.

Plaintiffs' appeal asserts the trial court erred in concluding, as a matter of law, that payments specified in an agreement between the Attorney General of North Carolina and Smithfield Foods, Inc., and its subsidiaries are not civil penalties required to be used to fund public education pursuant to Article IX, § 7 of the North Carolina Constitution. The trial court's order granting the defendant's motion for summary judgment and denying the plaintiffs' cross-motion for summary judgment is reversed in part and remanded for trial.

I. Background

On 25 July 2000, Michael F. Easley, in his capacity as Attorney General of North Carolina, entered into an agreement (the "Agreement") with Smithfield Foods, Inc. ("Smithfield") and several of its subsidiaries,

Brown's of Carolina, Inc., Carroll's Foods, Inc., Murphy Farms, Inc., Carroll's Foods of Virginia, Inc., and Quarter M Farms, Inc. (collectively, the "Companies").

Daniel Oakley, the former Division Director of the North Carolina Department of Justice's Environmental Division at the time the Agreement was negotiated and entered into, stated in an affidavit:

> The background for the [Agreement] was a five-year period of time, from 1995 to 2000, when ruptured or flooded swine waste lagoons, not all of them Smithfield's, had spilled millions of gallons of waste into North Carolina waterways, contaminating surface waters and killing aquatic life, while seepage from waste lagoons impacted groundwater supplies.

In the Agreement, the Department of Environmental Quality is referred to under its previous name of the Department of Environment and Natural Resources, or DENR. As of 1 July 2015, the agency was formally renamed the North Carolina Department of Environmental Quality. 2015 S.L. 241, § 14.30.(c), eff. July 1, 2015. We refer to the agency throughout this opinion under its current name of the Department of Environmental Quality ("DEQ").

Under the terms of the Agreement, the Companies entered into it for the purpose of undertaking "a series of environmental initiatives intended to preserve and enhance water quality in eastern North Carolina." To support "environmental initiatives," the Companies agreed to commit funds to "environmental enhancement activities." The Agreement specified these funds would be "paid to such organizations or trusts as the Attorney General will designate. The funds will be used to enhance the environment of the State, including eastern North Carolina, to obtain environmental easements, construct or maintain wetlands and such other environmental purposes, as the Attorney General deems appropriate."

In the Agreement, the Companies committed, among other things, to "pay each year for 25 years an amount equal to one dollar for each hog in which the Companies . . . have had any financial interest in North Carolina during the previous year, provided, . . . that such amount shall not exceed $2 million in any year." To facilitate these payments, the Companies maintain an escrow account into which funds are deposited. The Attorney General maintains the sole authority to direct the escrow agent to disburse funds to grant recipients, who are chosen by the Attorney General.

Under the Agreement, the Attorney General may consult with the Companies, DEQ, and "any other groups or individuals he deems appropriate and may appoint any advisory committees he deems appropriate[,]" in administering the grant program.

To facilitate the administration of the funds in escrow, the Attorney General established the Environmental Enhancement Grant Program ("EEG Program"). Every year since the Agreement was established, the Attorney General has received proposals from governmental agencies and nonprofit organizations to receive Environmental Enhancement Grants ("EEGs"). A panel consisting of representatives from the Department of Justice, DEQ, the North Carolina Department of Natural and Cultural Resources, academic institutions, and environmental nonprofit organizations reviews the EEG proposals and makes recommendations to the Attorney General. Representatives from Smithfield could also submit recommendations separate from the panel.

The Attorney General exercises sole discretion over the selection of grant recipients and approval of the amounts awarded, up to a maximum of $500,000 per award. After the Attorney General selects the grant recipients, the funds are distributed as reimbursements for expenses already incurred by the grant recipients. The Attorney General has awarded grants totaling more than $24 million since the Agreement was signed.

On 18 October 2016, Francis X. De Luca ("De Luca"), a citizen and resident of Wake County, North Carolina, filed a complaint against the Attorney General of North Carolina, Roy Cooper, in his official capacity. In his complaint, De Luca sought a preliminary and permanent injunction to prevent the Attorney General from distributing monies paid under the Agreement to any entities other than to the State's Civil Penalty and Forfeiture Fund.

The Attorney General filed a motion to dismiss on 19 December 2016. On 25 January 2017, while the motion to dismiss was pending, De Luca filed an amended complaint, which added the New Hanover County Board of Education ("NHCBE") as a party-plaintiff. Joshua H. Stein ("the Attorney General"), in his official capacity as the current Attorney General of North Carolina, was substituted as the defendant. The Attorney General subsequently filed an amended motion to dismiss.

On 14 June 2017 and 16 June 2017, respectively, De Luca and the NHCBE (collectively, "Plaintiffs") filed a motion for preliminary injunction and a motion for summary judgment. The trial court heard

Plaintiffs' motion for preliminary injunction and the Attorney General's amended motion to dismiss on 27 June 2017.

The trial court denied the Attorney General's motion to dismiss and granted Plaintiffs' request for a preliminary injunction, based upon the court's finding that Plaintiffs were "likely to prevail" and "the public interest favors the granting of a preliminary injunction." The Attorney General filed an answer to the amended complaint on 17 July 2017. On 21 July 2017, upon consent of the parties, an amended injunction was entered to clarify the preliminary injunction would only apply to grants awarded after 30 September 2016.

On 21 August 2017, two environmental organizations, who had previously received grants under the Agreement, the North Carolina Coastal Federation, Inc. and Sound Rivers, Inc. (collectively, "Intervenors"), filed a motion to intervene. On 22 September 2017, Plaintiffs served their opposition to the motion to intervene and renewed their motion for summary judgment. The same day, the Attorney General filed a motion for summary judgment. On 28 September 2017, the Intervenors filed a motion for leave to file a memorandum of law in support of the Attorney General's motion for summary judgment, and the North Carolina School Boards Association ("NCSBA") filed a motion for leave to file an *amicus curiae* brief in support of Plaintiffs' motion for summary judgment.

The parties' cross-motions for summary judgment, Intervenors' motion to intervene, and NCSBA's motion for leave to file an *amicus* brief were heard by the trial court on 5 October 2017. On 12 October 2017, the trial court entered its order, which granted the Attorney General's motion for summary judgment, denied Plaintiffs' motion for summary judgment, dismissed Plaintiffs' complaint with prejudice, and dissolved the preliminary injunction previously entered by the trial court. The trial court also entered orders granting Intervenors' motion to intervene and NCSBA's motion for leave to file an *amicus* brief. On appeal, Plaintiffs do not challenge the trial court's order, to the extent it granted Intervenors' motion to intervene.

From the trial court's order granting the Attorney General's motion for summary judgment and denying their motion for summary judgment, Plaintiffs filed timely notice of appeal on 25 October 2017.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017) as an appeal from a final judgment of the superior court.

III. Standard of Review

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [a] party is entitled to judgment as a matter of law." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citation and internal quotation marks omitted); *see* N.C. Gen. Stat. § 1A-1, Rule 56(c).

> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.
>
> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial. To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (citations and quotation marks omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

"Our standard of review of an appeal from summary judgment is *de novo*[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). "The evidence produced by the parties is viewed in the light most favorable to the non-moving party." *Hardin v. KCS Int'l., Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (citation omitted). "If the evidentiary materials filed by the parties indicate that a genuine issue of material fact does exist, the motion for summary judgment must be denied." *Vernon, Vernon, Wooten, Brown & Andrews, P.A. v. Miller*, 73 N.C. App. 295, 298, 326 S.E.2d 316, 319 (1985).

Here, both parties moved for summary judgment and assert no genuine issues of material fact exist. Under our *de novo* review of an order granting summary judgment, we are not bound by the trial court's

conclusion or the parties' contention that no genuine issues of material fact exist. *See MCC Outdoor, LLC v. Town of Wake Forest*, 222 N.C. App. 70, 75, 729 S.E.2d 694, 697 (2012) (denying summary judgment on both the plaintiff's and the defendant's motions after determining genuine issues of material fact existed).

IV. Analysis

A. Standing

[1] Intervenors argue Plaintiffs do not have standing to bring suit over the grant funds provided in the Agreement. Standing refers to "a party's right to have a court decide the merits of a dispute[,]" and provides the courts of this State subject matter jurisdiction to hear a party's claims. *Teague v. Bayer AG*, 195 N.C. App. 18, 23, 671 S.E.2d 550, 554 (citation and internal quotation marks omitted).

"[S]tanding is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction and can be challenged at any stage of the proceedings, even after judgment." *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, 370 N.C. 553, 561, 809 S.E.2d 558, 563-64 (2018) (internal quotation marks and citations omitted). "Standing is jurisdictional in nature and consequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of the case are judicially resolved." *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004).

Standing is a question of law which this Court reviews *de novo*. *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51 (2002), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003).

The Attorney General initially asserted De Luca lacked standing in a Rule 12(b)(6) motion to dismiss. The trial court ruled De Luca and NHCBE had standing in its 14 July 2017 order granting Plaintiffs' request for a preliminary injunction. The Attorney General subsequently reasserted Plaintiffs' lack of standing in a brief in support of his motion for summary judgment. The trial court expressly declined to revisit the issue of standing in its 12 October 2017 order, which granted Defendants' motion for summary judgment. The trial court's order states:

> In a prior order of the Superior Court, the Honorable Robert Hobgood presiding, the Court found that Plaintiffs DeLuca and the New Hanover Board of Education each had standing. Although Defendant raises this issue anew

> in arguing the current motion, the prior order of the Court will not be revisited by the undersigned.

Intervenors, but not the Attorney General, argue on appeal that the Plaintiffs lack standing. Neither the Attorney General nor the Intervenors appealed from the trial court's earlier order in which it concluded Plaintiffs each had standing. Nevertheless "[s]tanding is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction," *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878-79, *disc. review denied*, 356 N.C. 610, 574 S.E.2d 474 (2002), and "[a] challenge to subject matter jurisdiction may be made at any time." *Whittaker v. Furniture Factory Outlet Shops*, 145 N.C. App. 169, 172, 550 S.E.2d 822, 824 (2001) (citations, quotation marks, and ellipses in original omitted). Because, "subject matter jurisdiction may not be waived, and this Court has not only the power, but the duty to address the trial court's subject matter jurisdiction[,]" we address Intervenors arguments concerning standing. *Rinna v. Steven B.*, 201 N.C. App. 532, 537, 687 S.E.2d 496, 500 (2009).

1. De Luca's Standing

[2] With regard to Plaintiff De Luca, Intervenors argue De Luca's standing as a taxpayer is "limited to challenges against the government for misuse or misappropriation of *public funds*." (Emphasis original). Intervenors contend this case does not involve public or taxpayer funds because the grant funding at issue is provided by private companies. This Court addressed the question of taxpayer standing to bring suit under Article IX, § 7 of the North Carolina Constitution in *Fuller v. Easley*, 145 N.C. App. 391, 553 S.E.2d 43 (2001).

In *Fuller*, the plaintiff brought an action against then Attorney General Easley, alleging the Attorney General had improperly diverted proceeds from numerous lawsuits to a "public service message campaign." *Fuller*, 145 N.C. App. at 393-94, 553 S.E.2d at 45-46. The plaintiff alleged the lawsuit proceeds were required to be used to fund public education pursuant to Article IX, § 7 of the State Constitution. *Id.* at 396, 553 S.E.2d at 47. The plaintiff brought the suit in his capacity as a taxpayer of Wake County. *Id.* at 395, 553 S.E.2d at 46. The trial court dismissed the plaintiff's complaint for reasons unspecified in its order. *Id.* at 394, 553 S.E.2d at 46.

On appeal, the plaintiff argued the trial court improperly dismissed his complaint, in part, for lack of standing. *Id.* In addressing the plaintiff's arguments, this Court recited the rules regarding taxpayer standing, as follows:

> Generally, an individual taxpayer has no standing to bring a suit in the public interest. *Green v. Eure, Secretary of State*, 27 N.C. App. 605, 608, 220 S.E.2d 102, 105 (1975). However, the taxpayer may have standing if he can demonstrate:
>
> > [A] tax levied upon him is for an unconstitutional, illegal or unauthorized purpose[;] that the carrying out of [a] challenged provision will cause him to sustain personally, a direct and irreparable injury[;] or that he is a member of the class prejudiced by the operation of [a] statute.
>
> *Texfi Industries v. City of Fayetteville*, 44 N.C. App. 268, 270, 261 S.E.2d 21, 23 (1979) (citations omitted). Our review of plaintiff's complaint reveals no allegations which allow him to sue as an individual taxpayer.
>
> Nonetheless, plaintiff may have had standing to bring a taxpayer action, not as an individual taxpayer, but on behalf of a public agency or political subdivision, if " 'the proper authorities neglect[ed] or refus[ed] to act.' " *Guilford County Bd. of Comrs. v. Trogdon*, 124 N.C. App. 741, 747, 478 S.E.2d 643, 647 (1996) (quoting *Branch v. Board of Education*, 233 N.C. 623, 625, 65 S.E.2d 124, 126 (1951)). To establish standing to bring an action on behalf of public agencies and political divisions, a taxpayer must allege
>
> > that he is a taxpayer of [that particular] public agency or political subdivision, . . . [and either,] "(1) there has been a demand on and refusal by the proper authorities to institute proceedings for the protection of the interests of the political agency or political subdivision; or (2) a demand on such authorities would be useless."
>
> *Id.* (citation omitted).

Id. at 395-96, 553 S.E.2d at 46-47. This Court concluded the plaintiff in *Fuller* lacked standing because he had "failed to allege that the Wake County Board of Education or any other Board of Education refused to bring a suit to recover funds, that he requested the Board do so, or that such a request would be futile." *Id.* at 396, 553 S.E.2d at 47.

Upon reviewing Plaintiffs' complaint, Plaintiffs have failed to allege any basis upon which De Luca may sue solely upon his capacity as a

taxpayer. De Luca has not alleged that: (1) the payments at issue constitute an illegal or unconstitutional tax; (2) the Agreement has caused him a personal, direct, and irreparable injury; or, (3) he is a member of a class prejudiced by the Agreement. *See Texfi*, 44 N.C. App. at 270, 261 S.E.2d at 23.

De Luca's complaint also fails to allege he had made any demand upon proper authorities to bring suit, or that such a demand would be futile or useless. *See Trogdon*, 124 N.C. App. at 747, 478 S.E.2d at 647. Under our precedents, De Luca has not alleged a basis to sustain his standing to challenge the Attorney General's alleged violation of Article IX, § 7 of our State Constitution. *See Fuller*, at 394, 553 S.E.2d at 46.

2. NHCBE's Standing

[3] Intervenors also argue NHCBE does not have standing because it has not demonstrated "any injury in fact from the creation or execution of the Smithfield Agreement" and "[n]either plaintiff has presented any evidence to support a claim that the Agreement has deprived them of payments to which they are entitled." We disagree.

Taking the allegations in Plaintiffs' amended complaint as true and the monies paid by the Companies under the Agreement as penalties, then NHCBE would be an intended beneficiary of a portion of those monies under Article IX, § 7 of the State Constitution and under N.C. Gen. Stat. § 115C-457.2 (2017), which requires all "civil penalties, civil forfeitures, and civil fines" to be placed in the Civil Penalty and Forfeiture Fund for the benefit of the public schools.

Intervenors argument that NHCBE has failed to demonstrate standing is dependent upon viewing the allegations in Plaintiffs' amended complaint in light of the evidence in the record. However, whether a party has standing

> is determined at the time of the filing of a complaint. "Our courts have repeatedly held that standing is measured at the time the pleadings are filed. The Supreme Court has explained that '[w]hen standing is questioned, the proper inquiry is whether an actual controversy existed' when the party filed the relevant pleading." *Quesinberry v. Quesinberry*, [196 N.C. App. 118, 123], 674 S.E.2d 775, 778 (2009) (citation omitted).

Metcalf v. Black Dog Realty, LLC, 200 N.C. App. 619, 625, 684 S.E.2d 709, 714 (2009).

Viewing the allegations in Plaintiffs' complaint in the light most favorable to NHCBE, NHCBE would be an intended beneficiary of the monies the Companies have paid or are obligated to pay under the Agreement pursuant to Article IX, § 7 of the State Constitution. NHCBE has alleged that they have been deprived of money to which they are constitutionally entitled, and have consequently alleged an injury in fact. NHCBE has standing to maintain this action against the Attorney General and Intervenors. Intervenors' arguments are overruled.

B. N.C. Constitution Article IX, § 7

[4] Plaintiffs and the NCSBA argue the trial court erred in granting the Attorney General's motion for summary judgment, and denying Plaintiffs' motion, because the monies paid by the Companies under the Agreement are "penalties" pursuant to Article IX, § 7 of the North Carolina Constitution, as a matter of law. N.C. Const. art. IX, § 7.

Article IX, § 7 mandates "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools." N.C. Const. art. IX, § 7(a). Supplementing funding for public schools with proceeds from "penalties, forfeitures, and fines" as unbudgeted, non-recurring sources of revenue reflects North Carolina's stated and strong public policy to support public education. *See generally* David M. Lawrence, *Fines, Penalties, and Forfeitures: An Historical and Comparative Analysis*, 65 N.C. L. Rev. 49, 54-59 (1986).

The general statutes mandate that the proceeds of penalties and other monies within the scope of Article IX, § 7 must be remitted by the collecting agency to the Office of State Management and Budget in order for the proceeds to be deposited in the State's Civil Penalty and Forfeiture Fund. N.C. Gen. Stat. §§ 115C-457.2, -457.3 (2017).

The Supreme Court of North Carolina has defined a "penalty" to be an amount collected under a "penal law[ ]," or a "law[ ] that impose[s] a monetary payment for [its] violation [where] [t]he payment is *punitive* rather than remedial in nature and is *intended to penalize the wrongdoer* rather than compensate a particular party." *Mussallam v. Mussallam*, 321 N.C. 504, 509, 364 S.E.2d 364, 366-67 (emphasis supplied), *reh'g denied*, 322 N.C. 116, 367 S.E.2d 915 (1988).

"[A]n assessment is a penalty or a fine if it is 'imposed to *deter future violations* and *to extract retribution from the violator*' for his illegal

behavior." *Shavitz v. City of High Point*, 177 N.C. App. 465, 475, 630 S.E.2d 4, 12 (2006) (emphasis supplied) (quoting *N.C. School Bds. Ass'n v. Moore*, 359 N.C. 474, 496, 614 S.E.2d 504, 517 (2005)).

1. Civil Penalties

Plaintiffs and NCSBA assert our Supreme Court's holdings in *Craven County Bd. of Education v. Boyles*, 343 N.C. 87, 468 S.E.2d 50 (1996), and *Moore*, 359 N.C. 474, 614 S.E.2d 504, support their arguments that the monies paid pursuant to the Agreement are civil "penalties" and are required to be remitted to the Civil Penalty and Forfeiture Fund. The Attorney General and Intervenors argue the monies paid under the Agreement are not "penalties" because the payments were made "voluntarily" by the Companies, and were not intended to penalize the Companies for any environmental violations "or to deter future violations." *See Shavitz*, 177 N.C. App. at 475, 630 S.E.2d at 12. We disagree.

In *Moore*, the City of Kinston had been cited for environmental violations. 359 N.C. at 507-08, 614 S.E.2d at 524. The City of Kinston entered into a settlement agreement with DEQ, under which it agreed to fund a "Supplemental Environmental Project" in lieu of paying a civil penalty. *Id.* DEQ had established Supplemental Environmental Projects as an alternative enforcement mechanism under which environmental violators would agree to fund "projects that are beneficial to the environment and/or to public health" as part of settlements to enforcement actions. *Id.* at 508, 614 S.E.2d at 525.

The Supreme Court of North Carolina considered whether the monies paid by the City of Kinston to fund a Supplemental Environmental Project were subject to Article IX, § 7 of our State Constitution. *Id.* at 507-08, 614 S.E.2d at 524. The Court concluded the monies at issue were subject to Article IX, § 7, in part because:

> The payment would not have been made had [DEQ] not assessed a civil penalty against [the violator] for violating a water quality law. To suggest that the payment was voluntary is euphemistic at best. Moreover, the money paid under the [Supplemental Environmental Project] did not remediate the *specific harm* or damage caused by the violation even though a nexus may exist between the violation and the program [funded by the payment.]

Id. at 509, 614 S.E.2d at 525 (emphasis supplied).

In *Boyles*, a company had been formally assessed a civil penalty by DEQ of $1,466,942.44. *Boyles*, 343 N.C. at 88, 468 S.E.2d at 51. The

company sought administrative review of the penalty in the Office of Administrative Hearings. Before the matter was adjudicated, the parties settled. *Id.* The settlement required the company to pay $926,000, but recited that the vast majority of this amount was not a penalty, but instead was made to redress harm to the environment. *Id.* at 88-89, 468 S.E.2d at 51. Despite DEQ and the company explicitly specifying the settlement amount to not be a penalty, our Supreme Court had determined the settlement payments were "covered by Article IX, Section 7." *Id.* at 91, 468 S.E.2d at 52.

The Court based its determination primarily upon the fact the company had "entered into a settlement agreement" with DEQ "after the department found that the company had violated state environmental standards and assessed a civil penalty against" the company "for violation of those standards." *Id.* The company had subsequently "filed for a contested [case] hearing and then settled with the department in lieu of contesting the civil penalty that had been assessed." *Id.* The payments fell within the scope of Article IX, § 7 because they were "paid *because of a civil penalty assessed* against" the company. *Id.* (emphasis supplied).

2. Genuine Issues of Material Fact

To support their assertions that the monies the Companies agreed to pay under the Agreement before us are not penalties, the Attorney General refers to several affidavits submitted in support of his motion for summary judgment. In the affidavit of Alan Hirsch, he averred that negotiations of the Agreement were initiated in 1999 by Hirsch, the then Director of the Consumer Protection Division of the North Carolina Department of Justice under the direct authority of the Attorney General.

Hirsch and representatives of the Companies took approximately eight months to negotiate the Agreement. Attorneys from the Department of Justice's Environmental Division were also involved throughout the negotiation process, purportedly "[t]o be certain that there was nothing in the language of the draft agreement that could be read to limit or affect in any way the compliance responsibilities of [DEQ]."

Hirsch averred "the Agreement was not reached in order to settle any cases in which a civil penalty had been issued or might later be issued[,]" and "[t]he Agreement did not arise from or address any actual or alleged violations of law or regulation on the part of Smithfield. No penalties or punitive action of any sort was ever discussed or considered. The Agreement was not, and is not, punitive."

Regarding the Companies reasons for entering the Agreement, Hirsch stated:

> 9. I believe the purpose from Smithfield's perspective was to solve a long running problem of major public concern, to demonstrate good corporate citizenship by working towards better waste management solutions, and to further its public standing by making additional enhancements of North Carolina's environment. The image of the industry was under intense scrutiny by the press, citizens and the General Assembly, all a matter of great concern to the industry.

Daniel Oakley stated in his affidavit:

> 21. As a primary negotiator of [the Agreement], . . . I know that the [Agreement] was not reached in order to settle any cases in which a civil penalty had been assessed by [DEQ]. As Director of the Environmental Division, I know that no civil penalty being defended by attorneys in my Division was settled, compromised, or in any way impacted by the negotiation or execution of the [Agreement].
>
> . . .
>
> 24. Although there were Notices of Violation and Civil Penalty Assessments issued to various hog farms from 1995 to 2001, any Civil Penalty Assessments were resolved by other means and were not part of the Agreement at issue in this case.

The sworn attestations in these affidavits purport the payments the Companies undertook to pay under the Agreement are not punitive because they did not resolve any past, present, or future violations of environmental laws. Nonetheless, several factors in the record raise genuine issues of material fact regarding whether the payments were "intended to penalize" the Companies or were "imposed to deter future violations and to extract retribution from" the Companies. *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 367; *Moore*, 359 N.C. at 496, 614 S.E.2d at 517.

First, it is undisputed by the parties that the negotiating and consummating of the Agreement was instigated at the behest of and initiated by the Attorney General's office, and not by the Companies. If the Agreement was purportedly sought or undertaken by the Companies to "demonstrate good corporate citizenship" and to "improve the image" of the hog farming industry, as attested to by Alan Hirsch, and not to penalize the Companies for environmental or other legal violations or coerce the Companies' compliance with such laws, a genuine issue of

material fact exists regarding why the impetus for the Agreement was instigated from the office of the Attorney General, the chief law enforcement officer of the State, and not from DEQ or the Companies, or why the Attorney General retains sole authority over the disbursements of the funds. *See In re Investigation by Attorney General*, 30 N.C. App. 585, 589, 227 S.E.2d 645, 648 (1976) ("The Attorney General is . . . the State's chief law enforcement officer").

Second, the basis, formula, and manner in which the amounts are calculated for the Companies to pay each year under the Agreement are apparently based more in penalties, or a "head tax" calculation, rather than "voluntary contributions" designed to enhance the Companies' "good corporate citizenship," images or goodwill, and created issues of fact. The Agreement specifically provides:

> The Companies agree to pay each year for 25 years an amount equal to one dollar for each hog in which the Companies (including, for such purpose, any successor-in-interest of any of the Companies, by merger, sale of stock or assets or otherwise) have had any financial interest in North Carolina during the previous year, provided, however, that such amount shall not exceed $2 million in any year. For purposes of this paragraph, the Companies have a financial interest in any hog that, inter alia, they (or their nonparty subsidiaries or affiliates) raise, produce, contract for, own or slaughter.

The record does not disclose the reasoning upon which the Companies agreed to pay the annual amount of $1-per-hog for 25 years. If the Companies were purely motivated out of a desire to further their corporate image, as the Attorney General contends, it is not apparent why they would agree to pay $1-per-hog over 25 years as opposed to a specific lump sum or stated contribution.

We note that the per-hog payments specified under the Agreement bears a resemblance to the per-cigarette payments the General Assembly enacted in the late 1990s to implement the Master Settlement Agreement with tobacco manufacturers to settle lawsuits filed by several states' Attorneys General, including Attorney General Easley, over healthcare costs stemming from tobacco use.

> In November 1998, North Carolina and forty-five other states signed a Master Settlement Agreement (MSA) with four major tobacco manufacturers for the purpose of settling claims that North Carolina could have otherwise

asserted against those manufacturers arising from smoking-related health care costs incurred by the State as a result of the consumption of the major manufacturers' products. The General Assembly enacted a series of statutory provisions entitled the Tobacco Reserve Fund and Escrow Compliance Act (Act) in July, 1999 in order to effectuate the MSA. Pursuant to that legislation, all cigarette manufacturers doing business in North Carolina were made subject to N.C. Gen. Stat. § 66-291, which required them to choose between either (1) participating in the MSA or (2) paying certain specified sums, *computed on the basis of the quantities of cigarettes sold by April 15 of each year, into a special fund. See State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 433, 666 S.E.2d 107, 109 (2008). More specifically, N.C. Gen. Stat. § 66-291 provides that:

> (a) Any tobacco product manufacturer selling cigarettes to consumers within the State (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) after the effective date of this Article shall do one of the following:
>
> (1) Become a participating manufacturer (as that term is defined in section II(jj) of the Master Settlement Agreement) and generally perform its financial obligations under the Master Settlement Agreement; or
>
> (2) Place into a qualified escrow fund by April 15 of the year following the year in question the following amounts (as such amounts are adjusted for inflation): . . . .
>
> [e. For each of 2007 and each year thereafter: $.0188482 per unit sold.]
>
> N.C. Gen. Stat. § 66-291(a). The funds placed in escrow pursuant to N.C. Gen. Stat. § 66-291(a)(2) are intended to provide a source from which any judgment for reimbursement of medical costs obtained by the State against a nonparticipating manufacturer resulting from the consumption of cigarettes produced by that nonparticipating manufacturer can be satisfied.

State ex rel. Cooper v. Seneca-Cayuga Tobacco Co., 197 N.C. App. 176, 177-78, 676 S.E.2d 579, 581 (2009) (emphasis supplied) (citing N.C. Gen. Stat. § 66-291(a)).

Under the MSA:

> In return for the states dropping their suits against the four companies, the companies agreed to pay the states $206 billion over twenty-five years. Thereafter, payments were to continue to be based on the quantity of cigarette sales of each company. Payment was made as compensation for the additional cost that state Medicaid programs had allegedly incurred for treatment of Medicaid recipients with smoking-related diseases and as a penalty for deceptive trade practices of the companies.

Frank Sloan & Lindsey Chepke, *Litigation, Settlement, and the Public Welfare: Lessons from the Master Settlement Agreement*, 17 Widener L. Rev. 159, 161 (2011).

Unlike the tobacco MSA, the Attorney General and Intervenors contend the Agreement with the Companies before us is not a settlement agreement, as it purportedly did not "settle" any legal claims. However, a genuine issue of material fact exists of whether the Agreement was motivated by a desire by the Companies to forestall, or forebear, any potential claims the Attorney General or DEQ could have asserted against them.

If so, an issue of fact exists of whether the Companies would not have agreed to make the payments at issue, but for potential legal claims, and consequent civil penalties or fines, the Attorney General could have asserted against them. *See Moore*, 359 N.C. at 509, 614 S.E.2d at 525 (holding, in part, that a payment made by the City of Kinston to fund environmental programs in lieu of civil penalties asserted by DEQ was a penalty subject to Article IX, § 7).

The timing of enforcement actions taken against the Companies and subsequent facts also raise genuine issues of material fact with regard to whether the payments under the Agreement were intended to be punitive, or in lieu of enforcement actions asserted against the Companies. Records before the Court of DEQ enforcement actions against the Companies presented by Plaintiffs highlight that a number of the Companies had civil penalties assessed against them in the time period preceding and following the signing of the Agreement.

In the fourteen months preceding the signing of the Agreement, DEQ assessed nine civil penalties against the Companies for environmental violations. In the eight months following the signing of the Agreement, DEQ assessed nine additional penalties against the Companies. Eight

of these civil penalties were paid in full by the Companies, including six that were paid in full after the Agreement was signed. Seven penalties were settled for discounted amounts. Although the Companies paid many of these civil penalties after the Agreement was executed on 25 July 2000, *all* were for notices of violations accrued or issued by DEQ *before* the Agreement was executed. The record before us does not demonstrate DEQ issued *any* notices of violations to the Companies after the Agreement was signed.

This apparent discrepancy between the number of notices of violations issued to the Companies *before and after* the Agreement was signed raises genuine issues of material fact regarding whether the Attorney General, DEQ, and the Companies intended for the Agreement, and the payments specified therein, to be in lieu of further enforcement actions, and their related civil penalties, against the Companies. Whether these payments were "intended to penalize" the Companies or were "imposed . . . to deter future violations and to extract retribution from" the Companies is an issue of fact, which remains to be resolved. *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 366-67; *Moore*, 359 N.C. at 496, 614 S.E.2d at 517.

Another genuine issue of material fact, concerning whether the payments were intended to penalize the Companies, is also raised by the express terms of the Agreement. In addition to the commitment to pay up to $50 million for environmental enhancement activities, the Companies also committed in the Agreement to implement plans to correct "deficient site conditions or operating practices" on properties and operations they owned. The Companies also committed to implement what the Agreement refers to as "Environmentally Superior Technologies." The Agreement specifies, "[i]mplementation will include the installation and operation of monitoring equipment and procedures needed *to ensure compliance with applicable environmental standards*, in accordance with the applicable permit conditions." (Emphasis supplied).

The question of why the Companies committed to undertake actions to remediate deficient conditions on their farms and operations, install equipment, and *additionally* pay up to $50 million raises the issue of whether the $50 million in additional payments was intended to penalize the Companies for non-compliance with environmental standards or to induce forbearance on the part of the Attorney General, or DEQ, in bringing future enforcement actions. This is especially pertinent in light of the Companies relinquishing *any* control over to whom and in what amounts the Attorney General distributes the environmental grants.

Another genuine issue of material fact concerning whether these payments were intended to be penalties is raised by two official and public communications issued by the Attorney General's office in 2002 and 2013, respectively. Both of these communications expressly refer to the Agreement as a "settlement." Whether the Agreement is, in fact, a "settlement" is not ultimately determinative of whether the payments are penalties. *See Boyles*, 343 N.C. at 92, 468 S.E.2d at 53 (stating "it is not determinative that the monies were collected by virtue of a settlement agreement"). However, the Attorney General's reference to the Agreement as a "settlement" in these press releases raises a genuine issue of material fact of whether the parties intended for the Agreement, and the payments thereunder, to be in lieu of any potential claims or enforcement actions the Attorney General or DEQ could have brought against the Companies.

Based upon the genuine issues of material fact regarding whether these payments, instigated at the Attorney General's behest, were "intended to penalize" the Companies or were "imposed . . . to deter future violations and to extract retribution from" the Companies, the superior court incorrectly concluded these payments constitute civil penalties as a matter of law.

V. Conclusion

Genuine issues of material fact exist to preclude summary judgment for the parties. The record on appeal is not sufficiently developed for us to make the *de novo* determination of whether the payments undertaken by the Companies under the Agreement were, as a matter of law, "penalties" within the scope of Article IX, § 7 of our State Constitution. Whether these payments are penalties depends upon whether they were "intended to penalize" the Companies or "imposed to deter future violations and to extract retribution." *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 366-67; *Moore*, 359 N.C. at 496, 614 S.E.2d at 517.

We reverse the trial court's order, which determined that the payments are not penalties as a matter of law. We remand to the trial court for trial to determine whether the payments in the Agreement were intended to constitute penalties, payment in lieu of penalties, forbearance for potential or future enforcement actions, or were not penalties. The order of the trial court, which granted Defendant's motion for summary judgment, is reversed. This matter is remanded for trial. *It is so ordered.*

REVERSED AND REMANDED.

Judge BERGER concurs.

Judge BRYANT dissents with separate opinion.

Bryant, Judge, dissenting.

The majority holds that genuine issues of material fact exist so as to preclude summary judgment because the "record on appeal is not sufficiently developed for us to make the determination of whether the payments undertaken by the Companies [(Smithfield Foods, Inc., and subsidiaries)] under the Agreement were 'penalties' within the scope of Article IX § 7 of our State Constitution." The majority goes on to state that "[w]hether these payments are penalties depends upon whether they were 'intended to penalize' the Companies or 'imposed to deter future violations and to extract retribution.' " Because I believe the record on appeal is sufficient to make a determination as a matter of law on the question before this Court, I respectfully dissent.

The trial court concluded as a matter of law that funds paid pursuant to the agreement between the North Carolina Attorney General and the Companies were not subject to Article IX of the North Carolina Constitution and should not be remitted to the Civil Penalty and Forfeiture Fund. The question before this Court is whether the trial court erred in reaching this conclusion. I submit the trial court did not err.

I disagree with the majority's determination that there are genuine issues of material fact—a determination that is not otherwise supported herein. The record is replete with affidavits and submissions on the very matters for which the majority would have the trial court hold another hearing. In the summary judgment hearing before the trial court and in the arguments made before this Court, there was no argument that the case was not ripe for summary judgment or that genuine issues of material fact were yet to be decided. In fact, plaintiff-appellant states:

> The question before the trial court was a matter of law—whether the Smithfield Agreement constituted a settlement agreement such that the Section III.D payments must be remitted to the Civil Penalty and Forfeiture Fund. . . . ONLY A QUESTION OF LAW REMAINS . . . Plaintiffs have consistently maintained this case is one "where only a question of law on the indisputable facts is in controversy."

(citation omitted). Plaintiffs then go on to outline what they consider to be the relevant, indisputable facts, none of which are in controversy.

They, and all parties, acknowledge the only matter in controversy is the legal issue that has been appealed to this Court.

By determining that material issues of fact exist and that the matter should be remanded to the trial court, this Court has created an argument none of the parties anticipated. *See Viar v. N. Carolina Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts, however, to create an appeal for a[] [party]. As this case illustrates, the Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an [opposing party] is left without notice of the basis upon which an appellate court might rule." (citation omitted)).

Therefore, based on the voluminous evidence before this Court, I would reach the main legal issue before us—which is the same issue that was before the trial court—hold that the trial court properly applied the law to the undisputed material facts of this case, and affirm the judgment of the trial court.

FRANCISCO FAGUNDES AND DESIREE FAGUNDES, PLAINTIFFS
v.
AMMONS DEVELOPMENT GROUP, INC.; EAST COAST DRILLING & BLASTING, INC.; SCOTT CARLE; AND JUAN ALBINO, DEFENDANTS

No. COA17-1427

Filed 4 September 2018

Construction Claims—blasting—ultrahazardous activity—strict liability—independent contractor

A heavy equipment operator (plaintiff) who was injured by flying rock blasted in a construction site sufficiently alleged a strict liability claim against defendant development company—for whom plaintiff's employer was an independent contractor—to survive a 12(b)(6) motion to dismiss. The limited caselaw on the issue suggested that strict liability may attach to any party "responsible for" blasting, because it is an ultrahazardous activity.

Judge MURPHY concurring in result only.

Appeal by Plaintiff from order entered 9 October 2017 by Judge A. Graham Shirley, II in Superior Court, Wake County. Heard in the Court of Appeals 4 June 2018.

The Jernigan Law Firm, by Leonard T. Jernigan, Jr. and Anthony L. Lucas, for Plaintiff-Appellant Francisco Fagundes.

Ragsdale Liggett PLLC, by Amie C. Sivon and John M. Nunnally, for Defendant-Appellee Ammons Development Group, Inc.

McGEE, Chief Judge.

Francisco Fagundes ("Plaintiff") appeals an order entered 9 October 2017 granting summary judgment in favor of defendant East Coast Drilling & Blasting, Inc., defendant Scott Carle, and defendant Juan Albino (collectively, "the other defendants"). Plaintiff appeals the 9 October 2017 order for the sole purpose of appealing an order entered 8 December 2015 granting a motion to dismiss in favor of defendant Ammons Development Group, Inc. ("Defendant"). Plaintiff has no outstanding claims against the other defendants.[1] For the reasons discussed below, we reverse the trial court's 8 December 2015 order.

I. Factual and Procedural Background

Defendant was the developer of Heritage East ("Heritage East" or "the construction site"), a planned residential subdivision in Wake Forest, North Carolina. Defendant hired East Coast Drilling & Blasting, Inc., ("East Coast") to provide the services of onsite drilling, blasting, and crushing of rock during the construction of Heritage East. Plaintiff was employed by East Coast as a heavy equipment operator in East Coast's rock crushing division.

Members of East Coast's blasting crew were blasting a certain area within the construction site on or about 25 June 2013. Plaintiff was also working at the construction site that day. According to both Plaintiff and Defendant, Juan Albino ("Albino"), a blaster employed by East Coast, misinformed Plaintiff that Plaintiff was "located in a position that would be safe from flying debris and flyrock [that would be dislodged as a result of an imminent blast]." When Albino subsequently conducted the blast, flyrock and debris flew from the blast site with tremendous force. A heavy piece of rock struck Plaintiff's left leg, causing injuries.

Plaintiff filed a complaint against Defendant, East Coast, Albino, and Scott Carle, an East Coast executive officer, on 29 January 2015. In addition to various claims asserted against the other defendants, Plaintiff

1. Plaintiff Desiree Fagundes filed a voluntary dismissal in this action on 13 October 2015.

alleged Defendant was "strictly liable for the damages sustained by Plaintiff . . . that were proximately caused by the ultrahazardous activity of blasting." Defendant filed an answer and motion to dismiss Plaintiff's complaint on 20 April 2015. Citing N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), Defendant first asserted that Plaintiff failed to state a valid claim for relief. Among its additional defenses, Defendant further asserted that "[t]he doctrine of strict liability . . . does not apply to cases where injury results to those who have reason to know of the risk which makes the undertaking ultrahazardous and bring themselves within the area which will be endangered by its miscarriage." Defendant alleged that

> [a]s an employee working in the field of blasting, Plaintiff [] consented to the dangers and risks associated with the field of blasting and cannot recover against Defendant [] on a claim of strict liability. Plaintiff[] knowingly put himself at risk and was an active participant. Further, Plaintiff[] was warned about the risks associated with blasting and was trained regarding the risks associated with blasting.

The trial court granted Defendant's motion to dismiss on 8 December 2015. Plaintiff appealed the dismissal of his strict liability claim against Defendant, but this Court dismissed that appeal as interlocutory because Plaintiff "continue[d] to assert unadjudicated claims against [the other] defendants[,]" and Plaintiff did not specifically contend the interlocutory appeal affected a substantial right that would be lost absent immediate review. *See Fagundes v. Ammons Development Group, Inc.*, ___ N.C. App. ___, ___, 791 S.E.2d 876, ___ (2016) (unpublished).

The trial court subsequently denied summary judgment on Plaintiff's strict liability claim against the other defendants and Plaintiff's willful, wanton, and reckless negligence claim against Albino. On appeal, this Court reversed. *See Fagundes v. Ammons Development Group, Inc.*, ___ N.C. App. ___, 796 S.E.2d 529 (2017) ("*Fagundes I*"). We concluded that "because [Plaintiff] was injured in a work-related accident, the [North Carolina] Workers' Compensation Act provide[d] the exclusive remedy for his injuries, and the trial court lacked jurisdiction to adjudicate his strict liability claims against his employer." *Id.* at ___, 796 S.E.2d at 533. This Court also concluded the trial court erroneously denied summary judgment with respect to Plaintiff's claim against Albino for willful, wanton, and reckless negligence. *Id.* at ___, 796 S.E.2d at 533. On remand, the trial court entered an order on 9 October 2017 granting summary judgment for the other defendants on Plaintiff's strict liability claim, and granting summary judgment for Albino on Plaintiff's claim for willful, wanton, and reckless negligence. Consequently, Plaintiff concedes

the other defendants "are no longer aggrieved parties." Plaintiff now appeals from the 9 October 2017 order for the purpose of appealing the 8 December 2015 order dismissing Plaintiff's strict liability claim against Defendant.

II. Motion to Dismiss

A. *Standard of Review*

> A motion to dismiss under [N.C. Gen. Stat. § 1A-1, Rule] 12(b)(6) is the usual and proper method of testing the legal sufficiency of [a] complaint. In reviewing a trial court's Rule 12(b)(6) dismissal, the appellate court must inquire whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.

Newberne v. Department of Crime Control & Pub. Safety, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (citations and internal quotation marks omitted). "A complaint may be dismissed pursuant to Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010) (citation and quotation marks omitted). "The complaint must be liberally construed, and [a] court should not dismiss the complaint unless it appears *beyond a doubt* that the plaintiff could not prove *any* set of facts to support his claim which would entitle him to relief." *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 480, 593 S.E.2d 595, 598 (2004) (citation and quotation marks omitted) (emphases added). *See also Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428 (2007) ("The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when . . . *all the allegations included therein are taken as true*." (citation omitted) (emphasis added)); *Acosta v. Byrum*, 180 N.C. App. 562, 567, 638 S.E.2d 246, 250 (2006) ("When analyzing a 12(b)(6) motion, the court . . . is concerned with the law of the claim, not the accuracy of the facts that support [the] [] motion." (citation omitted)). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

B. *Analysis*

A Rule 12(b)(6) motion to dismiss "is addressed to whether the facts alleged in the complaint, when viewed in the light most favorable to the plaintiff[], give rise to a claim for relief on any theory." *Ford v. Peaches Entertainment Corp.*, 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986) (citation omitted). Importantly, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claim." *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 607, 659 S.E.2d 442, 448 (2008).

In the present case, Plaintiff's complaint alleged the following in support of his strict liability claim against Defendant:

> 58. Blasting is an ultrahazardous activity.
>
> 59. Defendant [] knew that blasting is an ultrahazardous activity.
>
> 60. Defendant [] hired [d]efendant East Coast to perform the ultrahazardous activity of blasting at the Heritage East development site, including the area in question.
>
> 61. In hiring [d]efendant East Coast to perform the ultrahazardous activity of blasting, Defendant [] ha[d] a nondelegable duty for the safety of Plaintiff [].
>
> 62. Defendant [] is strictly liable for the damages sustained by Plaintiff [] that were proximately caused by the ultrahazardous activity of blasting.
>
> 63. As a direct and proximate result of the ultrahazardous activity of blasting by Defendant [] as described herein, Plaintiff [] suffered the injuries and sustained the damages set forth above, and is entitled to compensatory damages[.]

In a memorandum of law filed by Defendant in support of its motion to dismiss, Defendant contended Plaintiff's complaint "disclosed facts which necessarily defeat Plaintiff's claim against [Defendant]." Defendant argued certain facts alleged in the complaint made it "clear that Plaintiff *assumed the risk of being injured by a blast* and as such Plaintiff has not stated a claim for which relief can be granted." (emphasis added). Defendant argued that Plaintiff "voluntarily exposed himself to danger both generally (by accepting employment with a blasting company[]) and specifically (by being at the blast [that occurred on [25 June] 2013[])."

On appeal, Defendant asserts that an employee of a blasting company has no legally cognizable strict liability claim – against *any* third

party – for blasting-related injuries sustained while at work. According to Defendant, in this context, "assumption of risk" is implicit in the contract of employment and bars recovery on the basis of strict liability as a matter of law. Thus, Defendant submits that, in the present case, "Plaintiff, an employee of a blasting company, has no recognized strict liability claim against the developer [] which hired [Plaintiff's] [employer]." Defendant further argues that, even if Plaintiff is entitled to assert a strict liability claim in this context, the affirmative defense of assumption of risk applies to Plaintiff's claim and, based on the allegations in Plaintiff's complaint, bars recovery as a matter of law. We disagree.

Ordinarily, "one who employs an independent contractor is not liable for the independent contractor's acts." *Reynoso v. Mallard Oil Co.*, 223 N.C. App. 58, 61, 732 S.E.2d 609, 611 (2012) (citation omitted). "However, if the work to be performed by [an] independent contractor is either (1) ultrahazardous or (2) inherently dangerous, and the employer either knows or should have known that the work is of that type, liability may attach despite the independent contractor status." *Kinsey v. Spann*, 139 N.C. App. 370, 374, 533 S.E.2d 487, 491 (2000) (emphasis added).

"Blasting is ultrahazardous because high explosives are used and it is impossible to predict with certainty the extent or severity of its consequences." *Guilford Insurance Co. v. Blythe Brothers Co.*, 260 N.C. 69, 74, 131 S.E.2d 900, 904 (1963) (citation and quotation marks omitted). In *Guilford*, our Supreme Court held that, as a result of the unpredictable and unpreventable dangers associated with blasting, "[b]lasting operations . . . must pay their own way. . . . The principle of strict or absolute liability for extrahazardous [sic] activity thus is the only sound rationalization." *Id.* (citation and quotation marks omitted). The Court subsequently described strict liability for blasting as

> [t]he rule . . . that one who is lawfully engaged in blasting operations is liable *without regard to whether he has been negligent*, if by reason of the blasting he causes direct injury to neighboring property or premises by casting rocks or debris thereon or by concussion or vibrations set in motion by the blasting.

Trull v. Well Co., 264 N.C. 687, 691, 142 S.E.2d 622, 624 (1965) (emphasis added). "To date, blasting is the only activity recognized in North Carolina as ultrahazardous. Consequently, those responsible are held strictly liable for damages, mainly because the risk of serious harm cannot be eliminated with reasonable care." *Jones v. Willamette Industries, Inc.*, 120 N.C. App. 591, 596, 463 S.E.2d 294, 298 (1995) (citation omitted).

Our appellate courts have distinguished between ultrahazardous activities, which give rise to strict liability, and "inherently dangerous activities," which are governed by principles of negligence. "Unlike ultrahazardous activities, inherently dangerous activities are susceptible to effective risk control through the use of adequate safety precautions." *Woodson v. Rowland*, 329 N.C. 330, 351, 407 S.E.2d 222, 234 (1991) (citation omitted). "[T]aking the necessary safety precautions can demonstrate reasonable care protecting the responsible party from liability under a negligence standard." *Id.* This Court stated in *Kinsey* that, in contrast to inherently dangerous activity claims, in cases involving ultrahazardous activities, "the employer is *strictly* liable for any harm that proximately results [from the ultrahazardous activity]. In other words, he is liable even if due care was exercised in the performance of the activity." *Kinsey*, 139 N.C. App. at 374, 533 S.E.2d at 491 (citations omitted) (emphasis in original).

> Generally, the [North Carolina] Workers' Compensation Act provides the exclusive remedy for an employee injured in a workplace accident. However, in *Woodson*, [] our Supreme Court created an exception allowing an employee to assert a [civil] claim against an employer for damages when the employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees[.]

Arroyo v. Scottie's Professional Window Cleaning, 120 N.C. App. 154, 158-59, 461 S.E.2d 13, 16 (1995) (citations and internal quotation marks omitted); *see also Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 239-40, 424 S.E.2d 391, 395 (1993). The "*Woodson* exception" applies not only to an employee's direct employer but also to "[o]ne who employs an independent contractor to perform an inherently dangerous activity[,] [and the principal hiring entity] may not delegate to the independent contractor the duty to provide for the safety of others[.]" *Woodson*, 329 N.C. at 352, 407 S.E.2d at 235. "The party that employs the independent contractor has a continuing responsibility to ensure that adequate safety precautions are taken." *Id.* Accordingly, under *Woodson*, a party that hires an independent contractor to perform an inherently dangerous activity, and "[knows] of the circumstances creating the danger," is liable to employees of the independent contractor if the principal employer fails to "exercise due care to see that [the employees] [are] provided a safe place in which to work and proper safeguards against any dangers as might be incident to the work." *Id.* at 356-57, 407 S.E.2d at 238.

We note that *Woodson* involved an employee who was killed while constructing a trench, an activity that may or may not be deemed *inherently dangerous* depending "on the particular trench being dug and the pertinent circumstances surrounding the digging." *Id.* at 356, 407 S.E.2d at 237; *see also O'Carroll v. Texasgulf, Inc.*, 132 N.C. App. 307, 313, 511 S.E.2d 313, 318 (1999) ("Although the determination of whether an activity is inherently dangerous is often a question of law, whether a particular *trenching* situation constitutes an inherently dangerous activity *usually* presents a question of fact and should be addressed on a case by case basis[.]" (citations omitted) (emphases in original)). Although *Woodson* involved an inherently dangerous activity claim, our Supreme Court stated in its opinion that

> [p]arties whose blasting proximately causes injury are held strictly liable for damages, largely because reasonable care cannot eliminate the risk of serious harm. Because these activities are extremely dangerous, they must "pay their own way," and the parties who are responsible must bear the cost regardless of whether they have been negligent.

Id. at 350-51, 407 S.E.2d at 234 (citations omitted). In the present case, Plaintiff contends this language in *Woodson* supports his strict liability claim against Defendant. *See also id.* at 352, 407 S.E.2d at 235 ("The rule imposing liability on one who employs an independent contractor [to perform an inherently dangerous activity] applies whether [the activity] involves an appreciable and foreseeable danger *to the workers employed* or to the public generally." (citation and internal quotation marks omitted) (second alteration in original) (emphasis added)). Defendant responds that *Woodson* "did not address whether the employees of independent contractors [are] included within the protection of strict liability claims" or "whether a strict liability claim can be brought by an employee of a company engaged in ultrahazardous activities against the entity who hired the company." Defendant observes that "[n]o North Carolina court has found that [a] hiring entity is strictly liable for an injury to an employee of the company who conducted an ultrahazardous activity." We observe, however, that Defendant also has not cited any North Carolina case law concluding a hiring entity *cannot*, as a matter of law, be strictly liable to employees of its independent contractor for blasting-related injuries.

In cases predating the North Carolina Workers' Compensation Act ("WCA"), *see* N.C. Gen. Stat. § 97-1 *et seq.*, our Supreme Court repeatedly

held that parties responsible for blasting operations could not avoid liability for harms associated with blasting merely by employing an independent contractor to do the work. *See Watson v. R.R.*, 164 N.C. 176, 182, 80 S.E. 175, 177 (1913); *Arthur v. Henry*, 157 N.C. 393, 402, 73 S.E.2d 206, 209-10 (1911); *Hunter v. R.R.*, 152 N.C. 682, 687-89, 68 S.E. 237, 239-40 (1910). With respect to *employees* of an independent contractor, our Supreme Court stated in *Greer v. Construction Co.*, 190 N.C. 632, 130 S.E. 739 (1925):

> The rule exempting an owner or contractor from liability for the negligence of an independent contractor to a stranger or third person does not necessarily exempt such owner or contractor from liability to the servant or employee of the independent contractor who is injured while engaged in work for the ultimate benefit of such owner or contractor. There is a relationship between the owner or contractor and the servant or employee of the independent contractor which may impose upon the former duties which the law does not impose upon him with respect to strangers or third persons. The law would not be just to itself or to those who have a right to rely upon it for protection, if an owner or contractor could, in all cases, by committing the work in which he is interested to an independent contractor, secure absolute exemption from all liability to those who by their labor and by methods and under circumstances contemplated when the original contract was made, contribute to its full performance.

Greer, 190 N.C. at 636, 130 S.E. at 742. Recognizing that "certain exceptions must be made to the general rule exempting owners or contractors from liability for the negligence of an independent contractor[,]" the Court further observed that

> [w]here the thing contracted to be done is necessarily attended with danger, however skillfully and carefully performed, or is intrinsically dangerous, it is held that the party who lets the contract to do the act cannot thereby escape responsibility for any injury resulting from its execution, although the act to be performed may be lawful.

Id. (citation and quotation marks omitted).

Defendant dismisses *Hunter*, *Arthur*, *Watson*, and *Greer* as "inapplicable" to the present case because they preceded both the WCA and the

adoption of strict liability for blasting in *Guilford*. Regardless, we find these cases useful for their discussions about the relationship between the employer of an independent contractor and third parties, *including* employees of the independent contractor, when the work of the independent contractor is "necessarily attended with danger, however skillfully and carefully performed[.]" *Greer*, 190 N.C. at 636, 130 S.E. at 742; *see also Watson*, 164 N.C. at 182, 80 S.E. at 177 ("[T]he doctrine is well established and is applicable here that the work at which the plaintiff [employee] was engaged[, blasting,] is so intrinsically dangerous that protection from liability will not be afforded by an independent contract[.]"); *Arthur*, 157 N.C. at 402, 73 S.E.2d at 210 ("[W]e must hold that the work to be done[, blasting,] was of such character that the defendant [quarry owner] could not protect himself by the lease he made, and that he is liable for the acts of the [independent contractor] in the prosecution of the work.").

Since *Guilford* – which did not involve personal injury or an employment-related claim – few cases in our State have applied the principle of strict liability for blasting. References to strict liability for blasting most often appear in *dicta* in cases involving inherently dangerous activity claims. In mentioning strict liability for blasting, however, our appellate courts have consistently indicated that a party "responsible for," or "engaged in," the ultrahazardous activity is strictly liable for harm caused by the blasting. *See*, *e.g.*, *Woodson*, 329 N.C. at 350-51, 407 S.E.2d at 234 ("Parties whose blasting proximately causes injury are held strictly liable for damages, largely because reasonable care cannot eliminate the risk of serious harm. Because these activities are extremely dangerous, they must 'pay their own way,' and *the parties who are responsible* must bear the cost regardless of whether they have been negligent." (citations omitted) (emphasis added)); *Trull*, 264 N.C. at 691, 142 S.E.2d at 624 ("The rule . . . is that *one who is lawfully engaged in* blasting operations is liable without regard to whether he has been negligent, if by reason of the blasting he causes direct injury to neighboring property or premises[.]" (emphasis added)); *Jones*, 120 N.C. App. at 596, 463 S.E.2d at 298 ("To date, blasting is the only activity recognized in North Carolina as ultrahazardous. Consequently, *those responsible* are held strictly liable for damages, mainly because the risk of serious harm cannot be eliminated with reasonable care." (emphasis added)). Our Supreme Court stated in *Trull* that "the rule of liability without allegation and proof of negligence . . . casts the risk of the venture [of blasting] on *the person who introduces the peril in the community*." *Trull*, 264 N.C. at 691, 142 S.E.2d at 624 (emphasis added). Our limited precedent on strict liability for blasting thus suggests that strict liability may attach to any person or

entity found "responsible for" blasting, and our pre-WCA case law suggests that parties "responsible for" blasting may include one that hires an independent contractor to conduct blasting operations.

Our case law also requires an element of proximate causation between the blasting operations at issue and the injury or damages alleged. *See*, *e.g.*, *Trull*, 264 N.C. at 691, 142 S.E.2d at 624 (holding "that one who is lawfully engaged in blasting operations is [strictly] liable . . . if by reason of the blasting he *causes direct injury*[.]" (emphasis added)); *Kinsey*, 139 N.C. App. at 374, 533 S.E.2d at 491 (noting an employer engaged in blasting "is *strictly* liable for any harm that *proximately results*." (citation omitted) (second emphasis added)); *Cody v. Dept. of Transportation*, 45 N.C. App. 471, 474, 263 S.E.2d 334, 335-36 (1980) ("Because of the inherently dangerous or ultrahazardous nature of blasting, when a contractor employed by the Department of Transportation uses explosives in the performance of his work, he is primarily and strictly liable for any damages *proximately resulting therefrom*." (citation and internal quotation marks omitted) (emphasis added)).

Here, Plaintiff's complaint specifically alleged that Defendant "*hired [] East Coast to perform the ultrahazardous activity of blasting* at the Heritage East development site, including the area in [which Plaintiff was injured]." (emphasis added). Plaintiff's complaint also alleged that "*[a]s a direct and proximate result* of the ultrahazardous activity of blasting by Defendant . . . , Plaintiff . . . suffered the injuries and sustained the damages set forth [in the complaint][.]" (emphasis added). We conclude that, under existing North Carolina law, Plaintiff has "allege[d] the substantive elements of a valid claim[]" for strict liability for blasting. *See Acosta*, 180 N.C. App. at 566-67, 638 S.E.2d at 250. Whether Plaintiff can successfully prove Defendant was or should be considered "responsible for" the blast that injured Plaintiff remains to be determined, but for purposes of Rule 12(b)(6), we find it sufficient that Plaintiff alleged Defendant directly solicited East Coast's blasting services, and that a blast conducted pursuant to Defendant's contract with East Coast proximately caused Plaintiff's injuries.

Recently, in a separate appeal by the other defendants in this matter, this Court determined that the WCA provides the exclusive remedy for an employee of a blasting company who is injured by blasting and seeks to recover against his employer, *i.e.*, the blasting company. *See Fagundes I*, ___ N.C. App. at ___, 796 S.E.2d at 532-33; *see also Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003) ("As this Court has often discussed, the [WCA] was created to ensure that injured employees receive sure and certain recovery for their

work-related injuries without having to prove negligence on the part of the employer or defend against charges of contributory negligence. In exchange for these limited but assured benefits, the employee is generally barred from suing the employer for potentially larger damages in civil negligence actions and is instead limited exclusively to those remedies set forth in the [WCA]." (citations and internal quotation marks omitted)). After observing in *Fagundes I* that "the workers' compensation system [itself] imposes strict liability on employers[,]" this Court expressly declined to "create a new exception to the [WCA] because of the high risk of serious injury in these types of ultrahazardous jobs and the robust common law remedies that were available to workers injured in these types of jobs before our General Assembly created the workers' compensation system." *Fagundes I*, ___ N.C. App. at ___, 796 S.E.2d at 533. We concluded that, notwithstanding the ultrahazardous nature of blasting, "because [Plaintiff] was injured in a work-related accident, the [WCA] provide[d] the exclusive remedy for his injuries, and the trial court lacked jurisdiction to adjudicate his strict-liability claims *against his employer*." *Id.* at ___, 796 S.E.2d at 533 (emphasis added). In the present case, Defendant urges us to "reject Plaintiff's additional attempt to expand strict liability" by recognizing a strict liability claim against an entity that hires an independent contractor to provide blasting services by an employee of the independent contractor injured by blasting.

Fagundes I involved Plaintiff's strict liability claim against his direct employer and co-employee only. *See Estate of Gary Vaughn v. Pike Electric, LLC*, 230 N.C. App. 485, 494, 751 S.E.2d 227, 233 (2013) ("Under the [WCA's] exclusivity provision, a worker is generally barred from bringing an action in our courts of general jurisdiction *against either his employer or a co-employee*. Instead, the worker must pursue his or her action before the North Carolina Industrial Commission." (internal citation omitted) (emphasis added)). This Court explicitly characterized the issue on appeal in *Fagundes I* as being "whether employees injured while working in 'ultrahazardous' jobs may sue *their employers* in the court system despite the provisions of the [WCA] requiring those claims to be pursued [before] the Industrial Commission." *Id.* at ___, 796 S.E.2d at 531 (emphasis added). While this Court suggested our analysis in *Fagundes I* encompassed employee claims "stemming from workplace injuries[,]" we also acknowledged language in *Woodson* that "discussed how a general contractor could be held strictly liable for injuries caused by a subcontractor engaged in an ultrahazardous activity, such as blasting." *Id.* at ___, 796 S.E.2d at 532 (citation omitted). In requiring Plaintiff to bring his claims against East Coast before the Industrial Commission, we stressed that "the workers' compensation

system [already] imposes strict liability *on employers*." *Id.* at ___, 796 S.E.2d at 533 (emphasis added).

"To be entitled to maintain a proceeding for workers' compensation, the claimant must be, in fact and in law, *an employee of the party from whom compensation is claimed*." *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988) (citations omitted) (emphasis added). "It is well established that in order for a claimant to recover under the Workers' Compensation Act, the employer-employee relationship must exist at the time of the claimant's injury." *Ramey v. Sherwin-Williams Co.*, 92 N.C. App. 341, 343, 374 S.E.2d 472, 473 (1988); *see also Hughart v. Dasco Transp., Inc.*, 167 N.C. App. 685, 689, 606 S.E.2d 379, 382 (2005) ("The claimant has the burden of proving that an employer-employee relationship existed at the time that the injury by accident occurred." (citation omitted)). "The question as to whether an employer-employee relationship existed at the time of injury is a question of jurisdictional fact . . . [that] is reviewable by this Court on appeal." *Durham v. McLamb*, 59 N.C. App. 165, 168, 296 S.E.2d 3, 5 (1982) (noting that, on appeal, "it is incumbent on this Court to review and consider *all of the evidence of record* and make an independent finding [as to the existence of an employer-employee relationship]." (citations omitted) (emphasis added)); *see also Postell v. B&D Const. Co.*, 105 N.C. App. 1, 10, 411 S.E.2d 413, 418 (1992) (listing "several factors that are indicative of an employee/employer relationship."). "[T]he Industrial Commission has no jurisdiction to apply the [WCA] to a person who is not subject to its provisions." *Youngblood*, 321 N.C. at 383, 364 S.E.2d at 437; *see also Spencer v. Johnson & Johnson Seafood*, 99 N.C. App. 510, 516, 393 S.E.2d 291, 294 (1990) (concluding that, because plaintiff was not an employee of defendant, Industrial Commission "was without jurisdiction to render an award under the [WCA].").

In the present case, nothing in Plaintiff's complaint suggests Plaintiff and Defendant had an employer-employee relationship at the time of Plaintiff's blasting-related injuries. *See McCraw v. Mills, Inc.*, 233 N.C. 524, 530, 64 S.E.2d 658, 662 (1951) (holding employee of independent contractor was not an employee of party that hired the independent contractor). Assuming *arguendo* that (1) Defendant *may* be subject to strict liability for Plaintiff's injuries *if* Defendant was "responsible for" its contractor's blasting operations, and (2) no employer-employee relationship existed between Plaintiff and Defendant when Plaintiff was injured, Plaintiff's only avenue for pursuing a strict liability claim against Defendant would be a civil action. As discussed above, it remains to be determined whether Defendant was "responsible for"

the blast that injured Plaintiff. Moreover, Plaintiff's complaint does not show on its face that an employer-employee relationship existed between Plaintiff and Defendant. We therefore find it premature to determine whether this Court's reasoning in *Fagundes I* regarding the WCA's exclusivity provisions necessarily defeats Plaintiff's strict liability claim against Defendant.[2]

Defendant offers various arguments why "[t]his Court *should* find[,] like courts in other states, and as laid out in American Jurisprudence, that employees of a blasting company cannot bring a strict liability claim against the entity who hired their company to do the work." (emphasis added). Defendant argues Plaintiff, as an employee of a blasting company, does not "fall within the scope of persons designed to be protected by strict liability." Citing case law from other jurisdictions, Defendant contends "no employee of a blasting company, *no matter his position*, should be entitled to bring a strict liability claim against a developer when the employee is at a blasting site in the course and scope of employment and injured by a blast caused by his employer." (emphasis added). According to Defendant, the mere fact that Plaintiff worked for a blasting company shows Plaintiff knew or should have known of the risks of blasting. Defendant also characterizes Plaintiff as a "participant" in the 25 June 2013 blast, rather than an "innocent bystander[][,]" because, *inter alia*, "[Plaintiff's] work in the rock crushing division involved him being on site when blasting occurred" and "[Plaintiff] was in the course and scope of his employment when the [25 June 2013] blast occurred." Defendant speculates that "employees involved in ultrahazardous activities directly benefit from the dangerous work performed

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2. We also note that the defendants in *Fagundes I* appealed the denial of their motions for summary judgment, not an order granting or denying a motion to dismiss.

> The distinction between a Rule 12(b)(6) motion to dismiss and a motion for summary judgment is more than a mere technicality. When considering a 12(b)(6) motion to dismiss, the trial court need only look *to the face of the complaint* to determine whether it reveals an insurmountable bar to [the] plaintiff's recovery. By contrast, when considering a summary judgment motion, the trial court must look at more than the pleadings; it must also consider additional matters such as affidavits, depositions and other specified matter outside the pleadings. Summary judgment is proper only when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law.

Locus v. Fayetteville State University, 102 N.C. App. 522, 527, 402 S.E.2d 862, 866 (1991) (citations omitted) (emphasis in original). "[T]he Rule 12(b)(6) motion is addressed solely to the sufficiency of the complaint and *does not prevent summary judgment from subsequently being granted based on material outside the complaint*." *Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 263, 257 S.E.2d 50, 53-54 (1979) (emphasis added).

by their company and presumably their compensation reflects the danger of the work." Defendant further submits it should not be liable to employees of its independent contractor because "[a] developer has a different role in a project than a[] [land]owner or a general contractor."

Whatever the factual accuracy of Defendant's contentions, we find them inappropriate bases for dismissing Plaintiff's complaint pursuant to Rule 12(b)(6). We are not persuaded that the mere fact of Plaintiff's employment by East Coast, or Plaintiff's mere presence "on site" at the time of the blast that injured him, demonstrate "*to a certainty* that [] [P]laintiff is entitled to no relief under any state [sic] of facts which could be proved in support of [his] claim." *See Ferguson v. Williams*, 92 N.C. App. 336, 339, 374 S.E.2d 438, 439 (1988) (emphasis added). Even assuming that an employee whose job *involves blasting* cannot bring a strict liability claim for employment-related blasting injuries, Plaintiff's complaint does not establish as a matter of law that his job with East Coast involved blasting or that, as Defendant contends, Plaintiff was not an "innocent party" under the circumstances surrounding his injuries.

Plaintiff's complaint does not establish on its face that Plaintiff, who did not work in East Coast's blasting division, was "involved," "engaged," or "a participant" in the ultrahazardous activity of blasting. Plaintiff alleged he was employed at all relevant times as a heavy equipment operator in East Coast's rock crushing division, and, on the date of the blast that caused his injuries, he "was working in the course and scope of his employment *as a heavy equipment operator in the rock crushing division of [] East Coast*." (emphasis added). According to Plaintiff's complaint, the Heritage East development comprised approximately 2,000 acres of land, and "substantial portions . . . were under construction at all times relevant[.]" The complaint does not indicate where, within the larger construction site, Plaintiff typically worked; how long, prior to 25 June 2013, he was employed by East Coast; or whether and to what extent Plaintiff's job in the rock crushing division required him to work with blasters or around blasting. The complaint alleged that, immediately before the 25 June 2013 blast, East Coast's blaster-in-charge "misinformed Plaintiff . . . that Plaintiff . . . was located in a position that would be safe from flying debris and flyrock." We are unable to determine whether Plaintiff knew, or should have known, he was at risk of serious injury despite being (as he believed) "outside the blasting area." Additionally, because Plaintiff's complaint reveals no information about Plaintiff's salary or other employment benefits, we are unable to determine at this stage whether, as Defendant suggests, Plaintiff's compensation may have reflected the ultrahazardous nature of blasting. *See*

Klingstubbins SE., Inc. v. 301 Hillsborough St. Partners, LLC, 218 N.C. App. 256, 262, 721 S.E.2d 749, 753 (2012) (noting "questions of . . . material facts [] cannot be resolved under Rule 12(b)(6).").

Given our limited case law on strict liability for blasting, we cannot conclude as a matter of law that Plaintiff falls outside "the scope of persons designed to be protected by strict liability[]" in this context. This Court's holding in *Boston v. Webb*, 73 N.C. App. 457, 326 S.E.2d 104 (1985), is instructive. In *Boston*, the plaintiff sued a city official for issuing a press release containing allegedly defamatory information about the plaintiff. The defendant successfully moved to dismiss the plaintiff's complaint under Rule 12(b)(6) on the basis that the plaintiff's complaint showed the defendant was acting within the scope of his authority as a public official when he issued the press release, and that the official's communications were therefore absolutely privileged. This Court reversed, finding it was

> too early in the plaintiff's action for us to say to a certainty that the plaintiff is entitled to no relief under any set of facts he might prove in support of his claim. We are unable to determine at this point whether [the defendant] was acting within the scope of his authority as [c]ity [m]anager when he published [the] news release. Similarly, from only the facts as found in the complaint, we cannot say whether all of the matter contained in the news release was privileged. . . . [Further], the defense of privilege is based upon the premise that some information, although defamatory, is of sufficient public or social interest to entitle the individual disseminating the information to protection against an action for liable. Whether such communications will be protected generally has been determined by the amount of public interest in the matter communicated.

Boston, 73 N.C. App. at 460-61, 326 S.E.2d at 106. This Court concluded the defendant's motion to dismiss was improperly granted "precisely because the public's interest in the matter and [the defendant's] right to relay it as he did remain[ed] to be determined." *Id.* at 461, 326 S.E.2d at 106. In the present case, we similarly find it too soon to determine whether the totality of the circumstances surrounding Plaintiff's injuries removed him from the ambit of strict liability protection that generally applies to third parties injured by blasting.

Defendant argues in the alternative that the defense of assumption of risk should apply to strict liability claims for ultrahazardous activities

and, in this case, requires dismissal of Plaintiff's complaint. *See Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 270, 333 S.E.2d 236, 238 (1985) ("When [a] complaint states a valid claim but also discloses an unconditional affirmative defense which defeats the asserted claim, [] the [12(b)(6)] motion will be granted and the action dismissed." (citation omitted)). As Defendant acknowledges, "[n]o North Carolina cases directly address the point of how assumption of the risk relates to a claim based on [a] defendant's strict liability for damages arising from an ultra[]hazardous activity." *Vecellio & Grogan, Inc. v. Piedmont Drilling & Blasting, Inc.*, 183 N.C. App. 66, 70, 644 S.E.2d 16, 19 (2007) (declining to address availability of assumption of risk defense for strict liability claims arising from ultrahazardous activities, where it was unclear "whether the evidence presented at trial on remand [would] even present a factual issue of assumption of risk[.]").

"The two elements of the common law defense of assumption of risk are: (1) actual or constructive knowledge of the risk, and (2) consent by the plaintiff to assume that risk." *Allred v. Capital Area Soccer League, Inc.*, 194 N.C. App. 280, 287, 669 S.E.2d 777, 781 (2008) (citation omitted); *see also Batton v. R.R.*, 212 N.C. 256, 268, 193 S.E. 674, 684 (1937) ("Assumption of risk is founded upon knowledge of [an] employee, either actual or constructive, of the risks and hazards to be encountered in the performance of his duties and his consent to take the chance of injury therefrom." (citation and quotation marks omitted)). The defense of assumption of risk "[is] affirmative and require[s] a showing on the part of the defendant to be considered at all; and to prevail as a matter of law, . . . it must plainly appear from the evidence that a reasonable mind could draw no other inference." *Bruce v. Flying Service*, 231 N.C. 181, 188, 56 S.E.2d 560, 564 (1949). This Court has held that, before an employee will be treated as having assumed the risks of his employment, he "must (or reasonably should) have been aware of the dangers involved and, in addition, must (or reasonably should) have appreciated the danger and risk connected with the [] conditions leading to his injury; *and [] in case of any doubt the question is ordinarily one for the jury*." *May v. Mitchell*, 9 N.C. App. 298, 303-04, 176 S.E.2d 3, 7 (1970) (citation and quotation marks omitted) (emphasis in original).

Here, Defendant's arguments in support of the assumption of risk defense are not materially distinguishable from its arguments concerning Plaintiff's ability to state a claim for relief. Defendant argues it is entitled to prevail based on the defense of assumption of risk because Plaintiff "took part in the blasting activity as an employee of the blasting company . . . performing work at the [construction] site[]" and because

"Plaintiff[]'s scope of work included him being in proximity to blasts." Again, Defendant does not cite any North Carolina case law in support of its argument that Plaintiff's complaint "makes it clear that Plaintiff[] assumed the risk associated with blasting and therefore he cannot bring a strict liability claim against [Defendant]."

As in *Vecellio*, we find it unnecessary to reach the question of whether, as a general matter, assumption of risk is available as a defense to a strict liability claim arising from an ultrahazardous activity. The mere facts that Plaintiff was employed by a company whose services included blasting, and that he came "within [] range of the blasting activity" on the date of his injuries, are insufficient to establish *as a matter of law* that Plaintiff "assumed the risks" of blasting. According to Plaintiff's complaint, Plaintiff was not employed as a blaster and, immediately prior to the blast that caused his injuries, he believed he was located at a safe distance from the blast. Based on the facts alleged in Plaintiff's complaint, we cannot say whether proximity to blasting was within Plaintiff's "scope of work;" whether Plaintiff "took part" in the blast that resulted in his injuries; or whether it was reasonable for Plaintiff to rely upon the assurances of the blaster-in-charge about being at a safe distance from the blast. Even assuming *arguendo* that the defense of assumption of risk can apply to strict liability claims for blasting, we are not persuaded that Plaintiff's complaint *clearly shows* Plaintiff had actual or constructive knowledge of the risks of blasting, or that he consented to assume those risks.[3] *See Andrews v. Elliot*, 109 N.C. App. 271, 275, 426 S.E.2d 430, 432 (1993) (reversing 12(b)(6) dismissal of plaintiff's complaint, where "plaintiff adequately alleged the essential elements of a claim for defamation *per se*," and "plaintiff's complaint on its face [did not] disclose[] in defendant's favor the affirmative defense of absolute or qualified privilege."); *cf. Holleman v. Aiken*, 193 N.C. App. 484, 497, 668 S.E.2d 579, 588 (2008) (affirming 12(b)(6) dismissal of plaintiff's libel claim based on the defense of truthfulness, because "from plaintiff's own complaint it [was] clear that some of the alleged defamatory statements [were] true.").

"We emphasize that our holding addresses the pleading stage only. We cannot predict whether a developed record will support [Plaintiff's]

3. We observe our Supreme Court has held that "assumption of risk is not available as a defense to one not in a contractual relationship to the plaintiff." *McWilliams v. Parham*, 269 N.C. 162, 166, 152 S.E.2d 117, 120 (1967); *see also Clark v. Freight Carriers*, 247 N.C. 705, 709, 102 S.E.2d 252, 255 (1958) (finding that, where there was "no allegation in the pleadings tending to show any contractual relationship between the plaintiff and the [] defendants, the doctrine of assumption of risk [was] not available as a defense." (citations omitted)).

allegations[.]" *Fussell*, 364 N.C. at 228, 695 S.E.2d at 441. We hold only that Plaintiff's complaint, construed liberally, states a strict liability claim for blasting-related injuries "sufficient to withstand a motion to dismiss filed pursuant to Rule 12(b)(6)." *Id.* at 228, 695 S.E.2d at 442. In *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970), our Supreme Court discussed the concept of foreseeable risk as a limit on a defendant's liability for negligence. The *Sutton* Court concluded that, although the plaintiff's complaint alleged facts that *seemed to suggest* the absence of foreseeable risk on the part of the defendants, the Court

> [could not] say on the basis of the 'bare bones pleadings' that [the] plaintiff cannot prove otherwise, or that he can prove no facts which would entitle him to recover from [the] defendants . . . for the damages resulting from the [incident alleged]. To dismiss the action now would be "to go too fast too soon." This case is not yet ripe for a determination that there can be no liability as a matter of law.

277 N.C. at 108, 176 S.E.2d at 169 (citations omitted). In the present case, we likewise find it "too early in [] [P]laintiff's action for us to say to a certainty that [] [P]laintiff is entitled to no relief under any set of facts he might prove in support of his claim." *Boston*, 73 N.C. App. at 460, 326 S.E.2d at 106.

III. Conclusion

Considering our limited precedent on strict liability for blasting and the lack of North Carolina case law involving the specific factual circumstances presented here, we cannot say "it appears *beyond doubt* that [] [P]laintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Hull v. Floyd S. Pike Electrical Contractor*, 64 N.C. App. 379, 380, 307 S.E.2d 404, 406 (1983) (citation omitted) (emphasis added). Accordingly, we conclude the trial court improperly dismissed Plaintiff's strict liability claim against Defendant. We therefore reverse the trial court's order granting Defendant's motion to dismiss and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judge STROUD concurs.

Judge MURPHY concurs in result only.

HENSON v. HENSON

[261 N.C. App. 157 (2018)]

THOMAS STEVEN HENSON, PLAINTIFF
v.
ROBIN BLACK HENSON, DEFENDANT

No. COA18-110

Filed 4 September 2018

Jurisdiction—subject matter—modification of order by trial court—during pendency of appeal

The trial court in an equitable distribution case lacked subject matter jurisdiction to enter an order modifying the language of a prior equitable order directing the distribution of the husband's retirement account, where the prior order had been appealed to the Court of Appeals and that court's mandate had not yet issued.

Appeal by plaintiff from judgment entered 20 June and 23 October 2017 by Judge D. Brent Cloninger in Cabarrus County District Court. Heard in the Court of Appeals 8 August 2018.

Kenneth P. Andresen, PLLC, by Kenneth P. Andresen, for plaintiff-appellant.

Ferguson, Hayes, Hawkins & DeMay, PLLC, by James R. DeMay, for defendant-appellee

ZACHARY, Judge.

Plaintiff-Husband Thomas Steven Henson appeals from the trial court's Domestic Relations Order and Order Denying Rule 60 Motion. Because the trial court lacked subject-matter jurisdiction to enter the Domestic Relations Order, we reverse the Order Denying Rule 60 Motion and vacate the Domestic Relations Order.

Background

Plaintiff-Husband Thomas Steven Henson and Defendant-Wife Robin Black Henson married in June 1984 and separated in October 2010. Plaintiff-Husband filed a complaint seeking absolute divorce and equitable distribution on 8 December 2011. On 4 January 2012, Defendant-Wife filed an answer and counterclaim for equitable distribution, post-separation support, and alimony.

The trial court entered an Equitable Distribution Order on 11 August 2015. Among the items distributed was Plaintiff-Husband's simplified

employment pension IRA account ("SEP IRA"). While the parties stipulated that the SEP IRA was worth $51,524.00 at the time of separation, the SEP IRA had accumulated an additional $30,000 to $40,000 in growth by the date of the equitable distribution hearing. Neither party contributed to the SEP IRA after the date of separation, and Plaintiff-Husband maintained that any growth in the value of the SEP IRA following separation was passive. At trial, Plaintiff-Husband stated that he wanted to keep the SEP IRA "to let it keep earning money."

The parties each submitted to the trial court a proposed equitable distribution order. Plaintiff-Husband's proposed equitable distribution order suggested the following in regard to the SEP IRA:

> Anderson and Strudwick SEP which is Plaintiff's retirement account with a stipulated value of $51,524.00 and Anderson and Strudwick IRA with a value of $4,783.67 which is Defendant's account. The IRA at a value of $4,783.67 is distributed to the Defendant and the SEP value of $51,524.00 is distributed to the Defendant.

Defendant-Wife, however, proposed that

> [t]he Anderson & Strudwick account should be distributed to the defendant in the amount of $51,524.00 as well as passive gains and losses subsequently thereafter.

The trial court's Equitable Distribution Order ultimately adopted Plaintiff-Husband's proposed order as it pertained to the SEP IRA, and distributed the account as follows:

> Anderson and Strudwick SEP which is Plaintiff's retirement account with a stipulated value of $51,524.00 and Anderson and Strudwick IRA with a value of $4,783.67 which is Defendant's account. The IRA at a value of $4,783.67 is distributed to the Defendant and the SEP value of $51,524.00 is distributed to the Defendant.

Defendant-Wife filed notice of appeal from the Equitable Distribution Order on 10 September 2015. However, Defendant-Wife did not challenge the trial court's distribution of the SEP IRA in that appeal. On 6 June 2017, this Court filed an opinion in Defendant-Wife's appeal affirming in part and reversing and remanding in part the trial court's order. The mandate was issued on 26 June 2017.

On 2 June 2017, four days prior to the issuance of this Court's opinion, Defendant-Wife's counsel sent an e-mail notifying both

Plaintiff-Husband's trial and appellate counsel of a proposed Domestic Relations Order regarding the SEP IRA. Defendant-Wife's proposed Domestic Relations Order provided that

> There were no contributions by the [Plaintiff-Husband] into the SEP IRA since date of separation, therefore, the SEP IRA, inclusive of gains and losses since date of separation of the parties, is to be conveyed to the [Defendant-Wife], in its entirety inclusive of gains and losses since date of separation.

A "read receipt" showed that the e-mail had been read; however, Defendant-Wife's counsel did not receive a response from Plaintiff-Husband's counsel. On 15 June 2017, Defendant-Wife submitted the proposed Domestic Relations Order to the trial court, along with a "Verification of Consultation With Opposing Counsel" indicating that Plaintiff-Husband's "counsel has not responded and this proposed judgment/order is submitted for your consideration." The trial court entered Defendant-Wife's proposed Domestic Relations Order on 20 June 2017 ("Domestic Relations Order").

On 11 July 2017, Plaintiff-Husband filed a Rule 60 Motion requesting that the Domestic Relations Order be set aside for surprise or inadvertence. Plaintiff-Husband also filed a Motion to Stay enforcement of the order, which the trial court granted on 28 July 2017. The trial court denied Plaintiff-Husband's Rule 60 Motion following a hearing on 23 October 2017. Plaintiff-Husband appeals.

Discussion

On appeal, Plaintiff-Husband argues that the trial court erred in entering the Domestic Relations Order and denying his Rule 60 Motion (1) because the trial court lacked subject-matter jurisdiction over matters contained within the earlier Equitable Distribution Order by virtue of Defendant-Wife's appeal; (2) because the Domestic Relations Order "substantively altered" the Equitable Distribution Order despite not having been based on (a) "a properly filed motion seeking to either [] alter or obtain relief from the" Equitable Distribution Order or (b) "any showing of extraordinary circumstances and that justice demanded the alteration"; and (3) because the issue of the SEP IRA's gains and losses had been abandoned due to Defendant-Wife's failure to raise it in her first appeal.

We first address Plaintiff-Husband's argument concerning the trial court's jurisdiction to enter the Domestic Relations Order, as we find it dispositive.

I.

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted). "[A]n appellate court has the power to inquire into [subject-matter] jurisdiction in a case before it at any time, even *sua sponte*." *Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 98, 693 S.E.2d 684, 687 (2010) (citation and quotation marks omitted).

II.

Initially, Defendant-Wife contends that subject-matter jurisdiction was not a bar to the trial court's Domestic Relations Order because that order "did not alter or modify the equitable distribution order." Rather, Defendant-Wife maintains that the Equitable Distribution Order should be interpreted as distributing to her the "entire" value of the SEP IRA, inclusive of any passive gains. Defendant-Wife's logic is that (1) the Equitable Distribution Order intended for her to receive the *entire* value of the SEP IRA; (2) the Domestic Relations Order stated the same; and (3) therefore, in that it made no alteration to the Equitable Distribution Order, her pending appeal did not divest the trial court of jurisdiction to enter the Domestic Relations Order. Because this argument contravenes the express language found in the Equitable Distribution and Domestic Relations Orders, we disagree.

Although Defendant-Wife repeatedly asserts that the Equitable Distribution Order awarded her "the entire SEP," this mischaracterizes the plain language of the trial court's Equitable Distribution Order, which ordered only that "the SEP value of $51,524.00 is distributed to the Defendant[-Wife]." Nowhere in the Equitable Distribution Order does the word "entire" or "entirety" appear. On the other hand, the Domestic Relations Order required that "[t]he SEP IRA shall distribute to [Defendant-Wife] . . . *in its entirety inclusive of gains and losses* since date of separation[.]" (emphasis added). The Domestic Relations Order thus effectively distributed an additional value of roughly $30-$40,000 in passive growth to Defendant-Wife which the Equitable Distribution Order, by its express language, did not.

Moreover, the fact that the Domestic Relations Order amended the original Equitable Distribution Order is further evidenced by the parties' proposed Equitable Distribution Orders. Defendant-Wife's proposed order requested that distribution of the SEP IRA include all passive gains and losses subsequent to the date of separation. However, the trial court rejected that proposal, opting instead to adopt the exact language contained in Plaintiff-Husband's proposed order. The trial court's exclusion

of any language awarding passive gains and losses in the account to Defendant-Wife demonstrates the unambiguous nature of the Equitable Distribution Order, with which the subsequent Domestic Relations Order was in direct contradiction.

Accordingly, we reject Defendant-Wife's assertion that the Domestic Relations Order did nothing to alter or amend the original Equitable Distribution Order's distribution of Plaintiff-Husband's SEP IRA. The Domestic Relations Order did just that. Therefore, we must consider whether the trial court had jurisdiction to make such an amendment.

III.

Plaintiff-Husband argues that Defendant-Wife's appeal from the Equitable Distribution Order divested the trial court of subject-matter jurisdiction over matters contained therein until this Court returned the case to the trial court by mandate on 26 June 2017. Because the trial court entered the Domestic Relations Order six days prior to the return of this Court's mandate, Plaintiff-Husband maintains that the Domestic Relations Order is void. On the other hand, Defendant-Wife argues that the trial court maintained jurisdiction over distribution of the SEP IRA account because it "was not an issue raised in Wife's prior appeal." We find Plaintiff-Husband's arguments persuasive.

"[W]hen an order arising from a domestic case is appealed, the cause is taken out of the jurisdiction of the trial court and put into the jurisdiction of the appellate court." *Traywick v. Traywick*, 31 N.C. App. 363, 366, 229 S.E.2d 220, 221 (1976). The general rule is that "an appeal from a trial court order 'stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein.' " *In re J.F.*, 237 N.C. App. 218, 227, 766 S.E.2d 341, 348 (2014) (quoting N.C. Gen. Stat. § 1-294 (2017)). At this stage in the proceedings, "[t]he lower court only retains jurisdiction to take action which aids the appeal and to hear motions and grant orders that do not concern the subject matter of the suit and are not affected by the judgment that has been appealed." *Ross v. Ross*, 194 N.C. App. 365, 368, 669 S.E.2d 828, 831 (2008). Otherwise, the trial court will regain its jurisdiction only after the appellate review has been completed, which occurs when "the cause is returned by the mandate of [the appellate] [c]ourt." *Joyner v. Joyner*, 256 N.C. 588, 591, 124 S.E.2d 724, 726 (1962). "[A]ny proceedings in the trial court after the notice of appeal are void for lack of jurisdiction." *Romulus v. Romulus*, 216 N.C. App. 28, 33, 715 S.E.2d 889, 892 (2011) (citation omitted).

In the instant case, as explained above, the subject-matter of the Equitable Distribution Order embraced the appropriate distribution of Plaintiff-Husband's SEP IRA account. Because distribution of the

SEP IRA was included within the Equitable Distribution Order, the trial court was divested of jurisdiction over that matter while the Equitable Distribution Order was pending appeal. *Jenkins v. Wheeler*, 72 N.C. App. 363, 365, 325 S.E.2d 4, 5 (1985) ("An appeal stays further proceedings in the lower court upon the *judgment appealed and matters embraced within that judgment*.") (alteration in original) (citations omitted). While Defendant-Wife maintains that "[t]he trial court retains jurisdiction during the pendency of an appeal to enter orders on matters not affected by the appeal," the well-settled rule is that "[a] trial court may proceed upon any matter not affected by the *judgment* appealed from." *Upton v. Upton*, 14 N.C. App. 107, 109, 187 S.E.2d 387, 389 (1972) (emphasis added); *see also Carpenter v. Carpenter*, 25 N.C. App. 307, 308, 212 S.E.2d 915, 916 (1975) ("As a general rule an appeal takes the *case* out of the jurisdiction of the trial court[.]") (emphasis added) (citations omitted). The trial court was thus divested of its jurisdiction over matters contained within the equitable distribution judgment *as a whole* at the moment Defendant-Wife perfected her appeal from that judgment.

Nor, as Defendant-Wife argues, does the fact that the SEP IRA portion of the Equitable Distribution Order "is a judgment directing the payment of money" vest the trial court with continuing jurisdiction over that matter. *See Romulus*, 216 N.C. App. at 37, 715 S.E.2d at 895 ("[A]lthough an equitable distribution distributive award is theoretically a 'judgment directing the payment of money' which is enforceable during the pendency of an appeal . . . , the trial court does not have jurisdiction after notice of appeal is given to determine the amount of periodic payments which have come due and remain unpaid during the pendency of the appeal and to reduce that sum to an enforceable judgment."). This is particularly so where the trial court has sought to exercise its jurisdiction in order to alter or amend a component of the original distributive award.

In sum, because the Equitable Distribution Order determined how the SEP IRA account would be distributed, the trial court did not have jurisdiction to enter a subsequent Domestic Relations Order modifying the language of that portion of the Equitable Distribution Order prior to issuance of this Court's mandate on 26 June 2017. Accordingly, because the trial court was without subject-matter jurisdiction to enter the Domestic Relations Order on 20 June 2017, we reverse the trial court's order denying Plaintiff-Husband's Rule 60 Motion and vacate the Domestic Relations Order.

VACATED.

Judges ELMORE and HUNTER, JR. concur.

IN RE J.M.K.

[261 N.C. App. 163 (2018)]

IN THE MATTER OF J.M.K.

No. COA18-451

Filed 4 September 2018

1. Termination of Parental Rights—petition—failure to allege ground—basis for termination

The trial court erred by concluding that grounds existed to terminate a father's parental rights to his daughter on the ground of abandonment where the termination petition did not allege that ground and thus did not put the father on notice of that ground as a potential basis for termination.

2. Termination of Parental Rights—grounds for termination—failure to pay child support—existence of child support order

The trial court erred by concluding that grounds existed to terminate a father's parental rights to his daughter on the ground of failure to pay child support where there was no evidence that he had any court-ordered obligation to pay child support.

3. Termination of Parental Rights—grounds for termination—failure to legitimate—required statutory findings of fact

The trial court erred by concluding that grounds existed to terminate a father's parental rights to his daughter on the ground of failure to legitimate where the trial court failed to make the required findings of fact as to each of the five subsections in N.C.G.S. § 7B-1111(a)(5).

Appeal by respondent from order entered 29 November 2017 by Judge Andrea F. Dray in Buncombe County District Court. Heard in the Court of Appeals 16 August 2018.

Siemens Family Law Group, by Diane K. McDonald, for petitioner-appellee mother.

Rebekah W. Davis for respondent-appellant father.

ZACHARY, Judge.

This is a private termination action between two parents. Respondent-father appeals the termination of his parental rights to the minor child, J.M.K. ("Jessica").[1] We reverse.

I. Background

The parties were in a relationship and lived together from February until September of 2014, but never married. During their relationship, Jessica was conceived. On 2 October 2014, petitioner-mother, who was pregnant, filed a complaint and motion for domestic violence protective order alleging that respondent-father destroyed the interior of her mobile home during a fit of rage. The trial court entered an *ex parte* domestic violence protective order the same day and subsequently entered a one-year domestic violence protective order on 4 December 2014.

Jessica was born at the beginning of May 2015. There was no father listed on her birth certificate, and petitioner-mother did not inform respondent-father of the birth. On 7 May 2015, respondent-father filed a *pro se*, verified complaint for custody, alleging that he was Jessica's father. On 29 May 2015, petitioner-mother filed an answer and counterclaim, in which she "neither admitted nor denied" that respondent-father was Jessica's father. Respondent-father failed to attend the resulting custody hearing, having been incarcerated for violating the terms of the domestic violence protective order. On 22 September 2015, the trial court entered an order awarding sole legal and physical custody to petitioner-mother.

On 15 July 2016, respondent-father filed a motion to modify the child custody order. On 27 July 2016, petitioner-mother filed a motion to dismiss respondent-father's motion, arguing that he had failed to establish paternity, or in the alternative, a motion for child support. On 24 October 2016, the trial court entered an order granting the motion to dismiss. The dismissal order noted that the prior custody order did not include a finding that respondent-father was Jessica's father.

On 19 July 2017, petitioner-mother filed a petition to terminate respondent-father's parental rights on the grounds of failure to pay child support and failure to legitimate. *See* N.C. Gen. Stat. § 7B-1111(a)(4)-(5) (2017). Respondent-father was appointed counsel, but he did not file an answer. The petition was heard on 28 November 2017. On 29 November 2017, the trial court entered an order terminating respondent-father's

1. A pseudonym is used to protect the identity of the minor child and for ease of reading.

parental rights to Jessica. Respondent-father entered timely notice of appeal.[2]

II. Grounds for Termination

[1] Respondent-father argues that the trial court erred by concluding that grounds existed to terminate his parental rights. We agree.

This Court reviews an order terminating parental rights to determine "whether the trial court's findings of fact were based on clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental termination should occur[.]" *In re Oghenekevebe*, 123 N.C. App. 434, 435-36, 473 S.E.2d 393, 395 (1996) (citation omitted). "[T]he trial court must enter sufficient findings of fact and conclusions of law to reveal the reasoning which led to the court's ultimate decision." *In re D.R.B.*, 182 N.C. App. 733, 736, 643 S.E.2d 77, 79 (2007).

In this case, the trial court made the following conclusion as to the grounds for terminating respondent-father's parental rights:

> That, pursuant to N.C.G.S. § 7B-1111, the Respondent, has abandoned the minor child for more than 6 months preceding the filing of the Petition. The Respondent has failed to visit with the minor child or inquire about her wellbeing. That the Respondent has failed to provide any financial or material support for the benefit of the minor child since the birth of the minor child. That the Respondent has failed to legitimate the minor child, has failed to file an affidavit of paternity in a central registry maintained by the Department of Health and Human Services. That the Respondent did not legitimate the minor child through marriage to the Petitioner mother. That the Respondent has failed to perform the natural and legal obligations of parental care and support, has failed to legitimate the minor child, and has withheld his presence, his love and care, to the detriment of the minor child.

The trial court's order does not specifically list any of the enumerated statutory grounds for termination. *See* N.C. Gen. Stat. § 7B-1111(a)(2017). However, the language included in this conclusion would potentially

2. Although the termination order was entered on 29 November 2017, respondent did not file notice of appeal until 19 February 2018 because the order was not served on respondent until 12 February 2018. *See* N.C. Gen. Stat. § 7B-1001(b) (2017) ("Notice of appeal . . . shall be made within 30 days after entry and service of the order . . . .").

provide the basis for three distinct grounds for termination: abandonment under section (a)(7), failure to pay child support under section (a)(4), and failure to legitimate under section (a)(5). We will review each of these grounds in turn.[3]

The petition filed in this matter only alleged two grounds for termination: failure to pay child support and failure to legitimate. There is nothing in the petition that would have put respondent-father on notice that his parental rights were subject to termination based on abandonment under N.C. Gen. Stat. § 7B-1111(a)(7). As a result, the trial court's conclusion that this ground existed must be reversed. *See In re C.W.*, 182 N.C. App. 214, 228-29, 641 S.E.2d 725, 735 (2007) ("Because it is undisputed that DSS did not allege abandonment as a ground for termination of parental rights, respondent had no notice that abandonment would be at issue during the termination hearing. Accordingly, the trial court erred by terminating respondent's parental rights based on this ground.").

[2] Next, the trial court concluded that respondent-father's parental rights were subject to termination on the ground of failure to pay child support. " '[I]n a termination action pursuant to this ground, petitioner must prove the existence of a support order that was enforceable during the year before the termination petition was filed.' " *In re D.T.L.*, 219 N.C. App. 219, 221, 722 S.E.2d 516, 518 (2012) (*quoting In re Roberson*, 97 N.C. App. 277, 281, 387 S.E.2d 668, 670 (1990)). Here, there was no evidence that respondent-father had any court-ordered obligation to pay child support. Consequently, the trial court's conclusion that this ground existed must also be reversed.

[3] Finally, the trial court concluded that respondent-father's parental rights were subject to termination based on his failure to legitimate Jessica pursuant to N.C. Gen. Stat. § 7B-1111(a)(5). This section provides that a court may terminate the parental rights of the father of a juvenile born out of wedlock upon a finding that the father has not, prior to the filing of the petition to terminate parental rights:

> a. Filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services;

3. In his brief, respondent-father also argues that the trial court erred by concluding that his rights were subject to termination on the ground of neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). However, this ground was not alleged in the petition and the trial court's conclusion does not adequately suggest the court determined this ground existed. *See In re O.J.R.*, 239 N.C. App. 329, 339, 769 S.E.2d 631, 638 (2015) ("If the trial court meant to terminate Respondent's parental rights [based on a specific ground], the trial court needs to provide both sufficient findings of fact and conclusions of law indicating that the trial court is proceeding pursuant to [that ground]."). Consequently, it is unnecessary to address this argument.

> provided, the petitioner or movant shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and the Department's certified reply shall be submitted to and considered by the court.
>
> b. Legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose.
>
> c. Legitimated the juvenile by marriage to the mother of the juvenile.
>
> d. Provided substantial financial support or consistent care with respect to the juvenile and mother.
>
> e. Established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

N.C. Gen. Stat. § 7B-1111(a)(5)(2017). "When basing the termination of parental rights on [N.C. Gen. Stat. § 7B-1111(a)(5),] the court must make *specific findings of fact* as to [each] subsection[.]" *In re I.S.*, 170 N.C. App. 78, 88, 611 S.E.2d 467, 473 (2005) (emphasis added). But the trial court only addressed subsections (a), (c), and (d) of this ground in the termination order. The order does not address subsection (b), whether respondent-father legitimated Jessica pursuant to N.C. Gen. Stat. §§ 49-10, or 49-12.1, or subsection (e), whether respondent-father established paternity through N.C. Gen. Stat. §§ 49-14, 110-132, 130A-101, 130A-118 or through any "other judicial proceeding." Because the trial court failed to make required findings under N.C. Gen. Stat. § 7B-1111(a)(5), the trial court's conclusion that respondent-father's rights were subject to termination on the ground of failure to legitimate must also be reversed.

III. Conclusion

The facts found by the trial court are insufficient to establish grounds for terminating respondent-father's parental rights, in that 1) the petition to terminate respondent-father's parental rights did not allege abandonment as a ground for termination; 2) there was no finding and no evidence of a court order requiring respondent to pay child support; and 3) the termination order did not make all of the required findings under N.C. Gen. Stat. § 7B-1111(a)(5) (2017). Thus, the termination order is reversed.

REVERSED.

Judges ELMORE and DAVIS concur.

BASMA KHATIB, A/K/A BASMA BADRAN NABABTEH, PLAINTIFF
v.
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA17-1430

Filed 4 September 2018

1. Appeal and Error—abandonment of argument—challenged findings of fact—failure to specify argument

Where a plaintiff appealing an order of the Industrial Commission challenged certain findings of fact but failed to specifically argue how those findings were unsupported by record evidence, the issue was deemed abandoned pursuant to Rule of Appellate Procedure 28(b)(6).

2. Tort Claims Act—bars to recovery—contributory negligence—falling in uncovered storm drain

Where plaintiff was injured falling into an uncovered storm drain and brought a negligence claim against the N.C. Department of Transportation under the Tort Claims Act, her claim was barred by her own contributory negligence in deviating from an intended pedestrian crosswalk path onto a grassy median and failing to keep a proper lookout.

Appeal by plaintiff from decision and order entered 23 August 2017 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 August 2018.

Bryant Duke Paris III PLLC, by Bryant Duke Paris III, for plaintiff-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alesia M. Balshakova, for defendant-appellee.

ELMORE, Judge.

Plaintiff Basma Khatib appeals a decision and order of the North Carolina Industrial Commission denying her negligence claim against the North Carolina Department of Transportation ("NCDOT"). Khatib sustained injuries after she admittedly deviated from a pedestrian crosswalk to cut across a grass median and stepped into an uncovered storm drain, falling five feet underground. She sued the NCDOT in the

Industrial Commission under the Tort Claims Act, *see* N.C. Gen. Stat. § 143-293, alleging that the NCDOT negligently failed to inspect and maintain the storm drain because when she fell into it, the grate normally covering the storm drain had been removed and was lying a few feet away. The Commission denied Khatib's claim in relevant part because it concluded she was contributorily negligent "when she chose to deviate from the marked crosswalk and run across the grassy median without keeping a proper lookout."

On appeal, Khatib contends the Commission erred by finding and concluding (1) the NCDOT owed her no duty to exercise reasonable care in maintaining its storm drain; (2) the NCDOT did not negligently breach this duty; and (3) Khatib's claim was barred by contributory negligence. Because we hold the Commission's challenged findings were supported by competent evidence, which in turn supported its conclusion that Khatib's claim was barred by her own contributory negligence, we affirm the Commission's decision and order on this basis.

I. Background

On 26 June 2011, Khatib's husband dropped her off to go for a jog near Centennial Parkway in Raleigh. At that time, Entrepreneur Drive formed a T-intersection with Centennial Parkway, and all four directions contained a pedestrian crosswalk that covered the entire square of the intersection. To the west, Entrepreneur Drive's four driving lanes dead-ended a few car lengths from the intersection, providing just enough space for cars to park, and those four lanes were center divided by a curbed grass median. The grass median extended east beyond the crosswalk, at which point it became a sidewalk that connected the two segments of crosswalk. A storm drain lie on the road adjacent to the northward facing curb of the grass median, a few feet west of the crosswalk. For reasons unknown, and first discovered by the NCDOT when it learned of Khatib's fall, the grate normally covering that storm drain had been removed and was lying a few feet away.

At approximately 8:00 p.m., Khatib called her husband to pick her up. Khatib continued jogging northbound on Centennial Drive's sidewalk as her husband, who had been driving southbound on Centennial Drive, pulled his car nose first into the northernmost lane of the westbound dead-end segment of Entrepreneur Drive and parked to wait for her. When Khatib saw her husband's vehicle, she chose not to follow the pedestrian crosswalk path behind the car to enter its passenger-side door but instead cut across the grass median to pass by the front of the car. Unfortunately, when Khatib stepped off the grass median's curb, she

stepped into the uncovered storm drain, fell approximately five feet, and sustained injuries.

Khatib sued the NCDOT under the Tort Claims Act for negligence. After a deputy commissioner dismissed her claim with prejudice based, in relevant part, on his conclusion that Khatib's claim was barred by her own contributory negligence, Khatib appealed to the Full Commission. After a hearing, the Commission entered a decision and order on 23 August 2017 affirming the deputy commissioner's decision, thereby denying Khatib's negligence claim against the NCDOT. In relevant part, the Commission found "[t]he hole [caused by the uncovered storm drain in which Khatib fell] was visible to anyone approaching, so long as they were keeping a proper lookout[,]" and Khatib's "failure to use the designated crosswalk and failure to pay attention to her surroundings, including the conditions of her path, when crossing the median were the proximate cause of plaintiff's fall and were not reasonable considering the circumstances." The Commission thus concluded that Khatib "failed to exercise the standard of care that a person of ordinary prudence would demonstrate when she chose to deviate from the marked crosswalk and run across the grassy median without keeping a proper lookout" and, therefore, that she was "barred from recovery under the Tort Claims Act on the basis of contributory negligence." Khatib appeals.

II. Analysis

On appeal, Khatib asserts the Commission erred by not (1) concluding the NCDOT owed her a duty to exercise reasonable care in maintaining its storm drain; (2) finding and concluding that the NCDOT's negligence caused her injuries; and (3) finding and concluding Khatib had not been contributorily negligent. Because we conclude the Commission's findings supported its conclusion that Khatib's claim was barred by contributory negligence, we affirm the Commission's decision and order on this basis and need not address the first two issues presented on appeal. *Cf. State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957) ("[A] correct decision of a lower court will not be disturbed because a wrong or insufficient or superfluous reason is assigned." (citation omitted)).

A. Review Standard

"The standard of review for an appeal from a decision by the Full Commission under the Tort[ ] Claims Act 'shall be for errors of law under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them.' " *Webb v. N.C. Dep't*

of Transp., 180 N.C. App. 466, 467, 637 S.E.2d 304, 305 (2006) (quoting N.C. Gen. Stat. § 143-293 (2005)). "[W]hen considering an appeal from the Full Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Full Commission's findings of fact justify its conclusions of law and decision." *Id.* at 467–68, 637 S.E.2d at 305 (brackets omitted) (quoting *Simmons v. N.C. Dep't. of Transp.*, 128 N.C. App. 402, 405–06, 496 S.E.2d 790, 793 (1998)).

B. Contributory Negligence

[1] Khatib asserts the Commission erred "when it failed to find as fact and conclude as a matter of law . . . that [she] was not guilty of contributory negligence." Khatib also contends the Commission's findings numbered 5, 7, and 8, as well as its legal conclusion numbered 11, which Khatib argues is actually a finding, were not supported by competent evidence. We disagree.

> Contributory negligence is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains. In order to prove contributory negligence on the part of a plaintiff, the defendant must demonstrate: (1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury. However, a plaintiff may relieve the defendant of the burden of showing contributory negligence when it appears from the plaintiff's own evidence that he was contributorily negligent.

Proffitt v. Gosnell, ___ N.C. App. ___, ___, 809 S.E.2d 200, 204 (2017) (citations, quotation marks, and brackets omitted).

The Commission made the following challenged findings and conclusion to support its determination that Khatib's claim was barred by contributory negligence:

> 5. Plaintiff saw her husband's vehicle and jogged toward[s] it. Plaintiff was running on the sidewalk then cut through the grass median away from the crosswalk and toward[s] the front of the vehicle. When she reached the curb of the median and stepped down, plaintiff fell into the uncovered storm drain, approximately five feet to the bottom.

> 7. [sic] According to plaintiff, at the time of the incident it was not dark, the weather was nice, and she "could see perfectly well." Plaintiff was focused on looking at her husband's vehicle. She was not looking at the sidewalk, the conditions of her chosen path of travel, or the terrain in front of her. The hole was visible to anyone approaching, so long as they were keeping a proper lookout.
>
> 8. [sic] Plaintiff testified that she did not use the designated crosswalk to get to the vehicle even though access to the crosswalk was available. . . . [P]laintiff's failure to use the designated crosswalk and failure to pay attention to her surroundings, including the conditions of her path, when crossing the median were the proximate cause of plaintiff's fall and were not reasonable considering the circumstances. Based on the preponderance of the evidence, plaintiff was contributorily negligent in causing the fall into the storm drain.
>
> . . . .
>
> 11. . . . [P]laintiff failed to exercise the standard of care that a person of ordinary prudence would demonstrate when she chose to deviate from the marked crosswalk and run across the grassy median without keeping a proper lookout. Accordingly, the Commission concludes that plaintiff is barred from recovery under the Tort Claims Act on the basis of contributory negligence.

However, as Khatib has failed to specifically argue how these findings were unsupported by record evidence, she has abandoned her purported evidentiary challenge to these findings. *See* N.C. R. App. P. 28(b)(6). Nonetheless, despite Khatib not mounting a proper substantial evidence challenge to the Commission's findings, our review reveals these findings were adequately supported by the record.

According to Khatib's own testimony, when her husband arrived to pick her up, it "wasn't dark," "[t]he weather was nice[,] and [she] could see perfectly well." When Khatib saw her husband's car arrive, she was looking "toward[ ] the car" and "could see [her husband] and . . . children," but could not see "anything else in front of [her]," including the "sidewalk." Khatib confirmed that "at the time [she was] approaching [her] husband's vehicle [she] was looking at him and [her] children" and was "not looking down at [her] feet" to see where she was walking. Khatib also confirmed that, rather than following the pedestrian-crosswalk path

behind the car in order to get to the passenger-side door, she cut through the grass median outside of the crosswalk path to pass in front of the car. Having concluded the evidentiary portions of these findings were supported by the record, we turn to whether these findings supported the Commission's conclusion that Khatib's claim was barred by her own contributory negligence.

[2] In her brief, Khatib concedes that, as she "was in the process of being reunited with her family at the conclusion of her exercise, she saw the family vehicle, [her husband], and her children and *was briefly distracted from watching where she was going*." (Emphasis added.) Nonetheless, she relies on *Kremer v. Food Lion, Inc.*, 102 N.C. App. 291, 295, 401 S.E.2d 837, 839 (1991) ("Although failure to discover an obvious defect will usually be considered contributory negligence as a matter of law, this general rule does not apply when circumstances divert the attention of an ordinarily prudent person from discovering an existing dangerous condition." (citation omitted)), to support her argument that "competent and substantial evidence mandates a finding of fact that [she] was not guilty of contributory negligence inasmuch as her attention was understandably diverted while she was exercising and it would have been likewise nearly impossible for her to see the uncovered inlet until she was directly on top of it." *Kremer* is distinguishable because the evidence there showed the plaintiff was walking down a grocery-store aisle intended for customer foot traffic, and Food Lion had placed items above the aisle intended to draw customer attention. After taking two steps into the aisle, the plaintiff fell over misplaced dog food bags. *Id.* at 296, 401 S.E.2d at 839. Here, contrarily, the evidence showed Khatib cut across a grass median outside the designated pedestrian-crosswalk path, and no circumstances attributable to the NCDOT's conduct distracted Khatib's attention. *Webb* controls this case.

In *Webb*, the plaintiff stopped his car at a rest area to purchase a newspaper. 180 N.C. App. at 466, 637 S.E.2d at 305. Although he saw a sidewalk for pedestrian travel that led to the newspaper kiosk, the plaintiff chose a more direct path across the grass and through a shrub bed covered in pine straw, where he was injured after tripping over a hidden metal protrusion. *Id.* at 466–67, 637 S.E.2d at 305. As here, the plaintiff sued the NCDOT for alleged negligence in failure to maintain the grounds, and the Commission concluded his claim was barred by contributory negligence. *Id.* at 467, 637 S.E.2d at 305. On appeal, we affirmed, determining the findings supported an inference that the plaintiff "should have had constructive, if not actual, knowledge that deviating from an intended walking path into pine straw brings with it some

danger of injury." *Id.* at 469, 637 S.E.2d at 306. We determined the "plaintiff clearly had the capacity to understand that his shortcut carried a safety risk[,]" and affirmed the Commission's decision to deny the claim based on the plaintiff's contributory negligence in deviating from the sidewalk. *Id.*

Here, as in *Webb*, the Commission's findings support a conclusion that Khatib should have known that deviating from the intended pedestrian-crosswalk path onto the grass median carried some danger of injury, and that her shortcut carried a safety risk. Further, the findings establish, and Khatib conceded below and on appeal, that she was distracted by her family and not looking where she was walking. Accordingly, we hold the Commission's findings support its conclusion that Khatib's claim was barred by her own contributory negligence, and affirm its decision and order.

III. Conclusion

The Commission's relevant challenged findings were supported by the record, which in turn supported its challenged conclusion that Khatib's claim against the NCDOT was barred by her contributory negligence in deviating from the crosswalk path to cut through the grass median and failing to keep a proper lookout where she was walking. Accordingly, we affirm the Commission's decision and order denying Khatib's claim on the basis of contributory negligence.

AFFIRMED.

Judges HUNTER, JR. and ZACHARY concur.

NNN DURHAM OFFICE PORTFOLIO 1, LLC v. GRUBB & ELLIS CO.

[261 N.C. App. 175 (2018)]

NNN DURHAM OFFICE PORTFOLIO 1, LLC; ET AL., PLAINTIFFS
v.
GRUBB & ELLIS COMPANY; GRUBB & ELLIS REALTY INVESTORS, LLC;
GRUBB & ELLIS SECURITIES, INC.; NNN DURHAM OFFICE PORTFOLIO, LLC;
AND NNN REALTY ADVISORS, INC., DEFENDANTS

No. COA17-607

Filed 4 September 2018

Real Property—settlement agreement—assertion of claims—interpretation—notice requirement

Pursuant to the plain language of the terms of a settlement agreement, plaintiff property owners were required not only to file a legal action but also to notify defendant property managers by a date certain in order to "duly and timely assert" their claims for damages after a loan default resulted in foreclosure. The trial court should have dismissed all of plaintiffs' claims as being barred by the settlement agreement because plaintiffs timely filed a claim but did not notify defendants until after the due diligence period specified in the agreement.

Appeal by Plaintiffs from order entered 3 January 2017 by Chief Business Court Judge James L. Gale in Durham County Superior Court, and cross-appeal by Defendants from order entered 3 January 2017 by Chief Business Court Judge James L. Gale in Durham County Superior Court. Heard in the Court of Appeals 6 March 2018.

Stark Law Group, PLLC, by Thomas H. Stark and Seth A. Neyhart, for Plaintiff-Appellants.

Parker Poe Adams & Bernstein LLP, by Charles E. Raynal, IV, Jamie S. Schwedler, and Catherine R.L. Lawson, for Defendant-Appellees Grubb & Ellis Company and Grubb & Ellis Securities, Inc.

Harris Sarratt & Hodges, LLP, by John L. Sarratt, for Defendant-Appellees Grubb & Ellis Realty Investors, LLC, NNN Durham Office Portfolio, LLC and NNN Realty Advisors, Inc.

Penry Riemann, PLLC, by J. Anthony Penry for Appellant – NNN Durham Office Portfolio 1, LLC, et al.

North Carolina Department of Secretary of State, by Enforcement Attorney Colin M. Miller, for amici curiae, the North Carolina Secretary of State and the North American Securities Administration Association, Inc.

DILLON, Judge.

I. Summary

Plaintiffs are entities and individuals who invested in a commercial real property transaction. Defendants are entities who marketed the investment and managed the property.

Years later, when the parties lost one of their main tenants and the real property struggled to generate sufficient income to meet expenses, Plaintiffs sought to remove Defendants as the property managers. To settle the matter, the parties entered into an agreement ("Settlement Agreement") whereby Defendants agreed to step aside as property managers and Plaintiffs agreed to waive all claims they may have had against Defendants.

The real property continued to struggle generating sufficient cash flow to cover all expenses, including debt service, which led to a loan default; and the lender eventually foreclosed. Thereafter, Plaintiffs commenced this action seeking damages against Defendants. Defendants moved for summary judgment on all claims. After a hearing on the matter, the trial court entered an order dismissing *most*, but not all, of Plaintiffs' claims. Both parties appealed.

We conclude that the trial court should have disposed *all* of Plaintiffs' claims, based on the Settlement Agreement. We, therefore, affirm in part and reverse in part.

II. Background

In 2006, an affiliate of Highwoods Properties, Inc., ("Highwoods") owned certain income-producing office buildings in Durham (the "Property"). The Property's primary tenants and a sub-tenant were affiliates of Duke Hospital ("Duke"). Duke's lease terms were all set to expire by 2010, and Duke was not ready to commit on extending the lease terms beyond 2010. Highwoods, therefore, decided to market the property for sale while Duke had several years remaining on its lease terms.

Defendants entered into an agreement with Highwoods to purchase the Property.[1] Defendants' intent in doing so was to remarket the Property to small investors who had recently sold other property and were in the market for a qualified "worry-free" real estate investment as a vehicle to defer tax on capital gains. Before closing, Defendants sought investors to participate in the purchase of the Property. Specifically, Defendants offered an investment vehicle (the "Security") which offered investors tenant-in-common interests in the Property along with Defendants' services to manage the investment.

In early 2007, Defendants successfully found investors, which included Plaintiffs. Defendants then closed on the purchase of the Property from Highwoods. The purchase from Highwoods was funded in great part with money collected from Plaintiffs and lender financing. Per the assignment provision in the purchase contract between Defendants and Highwoods, Defendants instructed Highwoods to convey the Property at closing directly to a number of entities, including Plaintiffs, as tenants-in-common.

Several months later, in late 2007, Duke informed Defendants that it would not be renewing most of its leases. And in 2010, Duke moved out of the majority of its space in the Property, causing cash flow issues for Defendants and Plaintiffs.

As the cash flow issues progressed, Plaintiffs sought to have Defendants replaced as the property managers. Defendants resisted. But on 25 March 2010, Plaintiffs and Defendants entered the Settlement Agreement, whereby Defendants agreed to step aside as the Property managers and whereby Plaintiffs agreed to release claims that it may have against Defendants.

In 2012, the Property continued to struggle producing sufficient cash flow, which resulted in a default of the loan. The lender foreclosed, and the Property was sold to a third party at foreclosure at a loss to Plaintiffs.

Plaintiffs commenced this action against Defendants. In a separate action, Plaintiffs sought damages from Highwoods and Highwoods' broker. In both actions, Plaintiffs allege that Defendants and Highwoods separately failed to make certain disclosures around the time of the

1. For purposes of clarity, I refer to Defendants collectively throughout this opinion, though they each played different roles. For instance, one contracted with Highwoods to purchase the Property, another acted as a broker who solicited investors, and another served as the Property's manager. However, because of our resolution of this matter, it is not important to go into greater detail of what *each* Defendant's role was in the matter.

purchase in 2007 regarding Duke's activities which tended to lessen the likelihood that Duke would seek to renew its leases in 2010. The trial court entered orders dismissing some of the claims against Defendants in this action and all of the claims against Highwoods in the other action.

In 2017, both matters were brought up on appeal to our Court. The appeal of the trial court's dismissal of Plaintiffs' claims against Highwoods is addressed in a separate opinion.

This present appeal addresses the trial court's decision to dismiss most, but not all, of Plaintiffs' claims against Defendants. Plaintiffs appealed, and Defendants cross-appealed.

III. Appellate Jurisdiction

Before addressing the merits, we must first consider our appellate jurisdiction since this appeal is interlocutory in nature. While the trial court has disposed of *most* of the claims asserted by Plaintiffs, it denied Defendants' request to dismiss claims brought under North Carolina securities law by the five Plaintiffs domiciled in North Carolina (the "NC Securities Claims").

Generally, we do not have jurisdiction to consider an appeal from an interlocutory order unless the appellant meets its burden of demonstrating to our Court how the order appealed from affects a substantial right or that the order has been properly certified for immediate appeal by the trial court pursuant to Rule 54(b) of our Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1-277; N.C. Gen. Stat. § 1A-1, Rule 54(b). Otherwise, we generally do not have jurisdiction unless we choose in our discretion to grant a petition for a writ of *certiorari*.

Here, no party has made any argument that a substantial right has been affected. The trial court has properly certified for immediate review all of the claims that were dismissed, but the trial court did not certify for immediate review the NC Securities Claims, which were not dismissed. Therefore, based on the trial court's Rule 54 certification, we have appellate jurisdiction only over the claims that were dismissed, but not over the NC Securities Claims.

We note that no party has filed a petition requesting that we grant a writ of *certiorari* to review the NC Securities Claims. On our motion, however, we hereby issue a writ of certiorari "to aid in our own jurisdiction" to consider Plaintiffs' NC Securities Claims as well. N.C. Gen. Stat. § 7-27(c) (General Assembly granting to the Court of Appeals jurisdiction "to issue prerogative writs . . . in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts"). We

do so in the interests of judicial economy as our legal reasoning which resolves the other claims and also resolves the NC Securities Claims.

IV. Analysis

Having determined that we have jurisdiction over this appeal, we address the merits.

The trial court dismissed most of Plaintiffs' claims, but not based on the Settlement Agreement in which Plaintiffs purportedly agreed to release Defendants from all claims related to the Property. Regarding the Settlement Agreement, the trial court expressly held that the Settlement Agreement did not bar Plaintiffs from pursuing the remaining claims against Defendants. Based on Section 2.4 of the Settlement Agreement, which is discussed below, we conclude that *all* of Plaintiffs claims against Defendants should have been dismissed.

In March 2010, Plaintiffs and Defendants entered into the Settlement Agreement, whereby Defendants agreed to step aside without a fight if Plaintiffs agreed to release Defendants from any potential claims relating to the Property. The obligations in the Settlement Agreement, however, were not instantaneous, but the Agreement allowed Plaintiffs a due diligence period, until 2 July 2010, to decide whether they were willing to release Defendants from all claims. Specifically, Section 2.4 of the Settlement Agreement provided (1) that Plaintiffs had until 2 July 2010 to "assert" any claims that it wished to exclude from the operation of the release; (2) that if Plaintiffs elected to retain the right to assert certain claims, then Defendants could elect to back out of their promise to resign as Property managers; and (3) that if Plaintiffs did not duly assert any claims by 2 July 2010, then all potential claims of Plaintiffs against Defendants would be released, and Defendants would be obligated to complete the steps necessary to step aside as Property managers.

On 1 July 2010, the day prior to Plaintiffs' deadline under Section 2.4 to assert claims, Plaintiffs commenced this action by filing a Summons with the trial court pursuant to Rule 3 of our Rules of Civil Procedure, which allowed Plaintiffs an additional 20 days to file their complaint.[2] In their Summons, Plaintiffs described the nature of the claims they planned to assert in their complaint.

Importantly, though, Plaintiffs did not notify Defendants of the Summons or otherwise of their intent to assert claims by the 2 July 2010

2. Rule 3 allows a party to commence an action by filing a summons and requesting permission to file the complaint within 20 days. N.C. Gen. Stat. § 1A-1, Rule 3.

deadline. Rather, based on the record and the findings of the trial court, Defendants did not become aware of Plaintiffs' intention until they received a copy of the Summons on 12 July 2010, which Plaintiffs had mailed five days earlier on 7 July 2010.

The issue raised in this appeal is whether Plaintiffs properly "asserted" claims under Section 2.4 of the Settlement Agreement by simply commencing the action by 2 July 2010 or whether under Section 2.4 Plaintiffs were required also to notify Defendants of their intent by 2 July 2010 to exclude claims they wished to assert from the operation of the release. The language of Section 2.4 states as follows:

> It is acknowledged that the release provisions contained in Paragraph 2.1 and 2.2 are subject to and conditioned upon the absence of any claims by [Plaintiffs] asserted against [Defendants] prior to July 2, 2010[.] [Plaintiffs] shall have until [July 2, 2010] to conduct such inquiries and investigations as they may determine to be necessary and appropriate . . . to determine whether or not they have a viable claim against [Defendants].
>
> Should [Plaintiffs] discover such a claim, they shall give written notice to [Defendants] of such claim (an "Excluded Claim") prior to [July 2, 2010], including the description of the basis of such claim in reasonable detail,
>
> and
>
> they shall commence an action or arbitration proceeding with regard to such Excluded Claim prior to [July 2, 2010].
>
> Should [Plaintiffs] duly and timely assert an Excluded Claim prior to [July 2, 2010] . . . the [release] shall be void and of no force and effect with respect to the Excluded Claim . . . [.][3]

Plaintiffs argued to the trial court (and argue here on appeal) that Plaintiffs met their contractual obligations "to assert an Excluded Claim" under the Settlement Agreement simply by filing the Summons which commenced this action by 2 July 2010, without providing any notice by 2 July 2010 to Defendants. Defendants argued to the trial court (and argue here on appeal) that Plaintiffs could only properly "assert" a claim

3. This paragraph in the actual Settlement Agreement is a single block paragraph. It is broken up in this opinion for ease of reading.

by *both* commencing their action *and* notifying Defendants in writing of their intent to exclude claims from the reach of the release.

The trial court concluded that Section 2.4 was ambiguous and, therefore, that the provision should be read "restrictively" against Defendants, such that Section 2.4 "effectively precluded the release from becoming effective once Plaintiffs initiated their action on July 1, 2010," notwithstanding that Plaintiffs did not give Defendants any notice until after 2 July 2010.

In reviewing the trial court's interpretation, we are mindful of a court's role in construing contract language:

> Interpreting a contract requires the court to examine the language of the contract itself for indications of the parties' intent at the moment of execution. If the plain language is clear, the intention of the parties is inferred from the words of the contract. Intent is derived not from a particular contractual term but from the contract as a whole.

State v. Philip Morris, 363 N.C. 623, 631-32, 685 S.E.2d 85, 90 (2009) (citations omitted).

We have reviewed Section 2.4 in context with the entire agreement, and we disagree with the trial court's interpretation that Section 2.4 did not require Plaintiffs to notify Defendants of their intent to exclude claims by the 2 July 2010 deadline. Reading the contract as a whole, based on its plain language, we conclude that the parties intended that Plaintiffs were required *both* to file their action *and* separately to notify Defendants of such claims, all by the 2 July 2010 deadline, to preserve any claims that they did not want to release. Each requirement served different purposes.

Under the terms of the Settlement Agreement, Plaintiffs were required to file their action by 2 July 2010 to avoid any claim from being barred by the applicable statute of limitations. That is, under another provision of the Settlement Agreement, Defendants agreed that all applicable statute of limitations with respect to any potential claims would be tolled from the date of the agreement in March 2010 until 2 July 2010, while Plaintiffs conducted their due diligence. The requirement that a lawsuit be filed clarified that statutes of limitations would be tolled indefinitely for any claims which Plaintiffs wished to assert, but that they would only be tolled until 2 July 2010.

The "notice" requirement – that Plaintiffs provide actual notice to Defendants of any claims by 2 July 2010 – served a different purpose. Specifically, the Settlement Agreement contemplated that during Plaintiffs' due diligence period, Defendants would allow Plaintiffs' chosen Property manager to manage the Property on a subcontract basis and that Defendants would also work with Plaintiffs in obtaining the required lender approval for the change in management. The last portion of Section 2.4 of the Settlement Agreement provided that Defendants would have the right to cease these efforts and terminate the subcontracts with Plaintiffs' chosen manager *if* Plaintiffs elected to assert claims. If Plaintiffs were not required to give notice by 2 July 2010 that they intended not to release Defendants from all claims, then the provision in Section 2.4 relieving Defendants of their obligation under the Settlement Agreement to step aside as Property managers in such case could be rendered meaningless; Defendants could not enforce this right unless they knew Plaintiffs had decided not to grant a full release. As described below, under Plaintiffs' interpretation, Plaintiffs could have withheld notice for many months until after Defendants had completed the process of stepping aside as Property managers.

But first, we note that a plain reading of Section 2.4, when read in context of the whole Settlement Agreement, supports our interpretation. This Section describes 2 July 2010 as the "Effective Date of Release," at which time Plaintiffs' release of all potential claims against Defendants would become effective under the Settlement Agreement.

The first sentence of Section 2.4 states that the release would be effective unless Plaintiffs "asserted" claims against Defendants by "2 July 2010 (the "Effective Date of Release")."

The second sentence states that Plaintiffs would be allowed to conduct due diligence until the Effective Date of Release to determine if they wanted to assert claims.

The third sentence is the key sentence, which states *how* Plaintiffs were required to "assert" claims that they wished to exclude from the operation of the full release. This third sentence is a single compound sentence and required that Plaintiffs "shall give written notice to [Defendants] prior to the Effective Date of Release, and they shall commence an action or arbitration [] prior to the Effective Date of Release."

The fourth sentence then states that "[s]hould [Plaintiffs] duly and timely assert an Excluded Claim prior to the Effective Date of Release[,]" then the provisions of the full release "shall be void and of no force and

effect with respect to the Excluded Claim" and further Defendants could cancel the subcontracts with Plaintiffs' chosen Property manager.

In sum, we conclude that a plain reading of this Section required that to "duly and timely assert" a claim, Plaintiffs had to notify Defendants *and* file their action by 2 July 2010.

Based on Plaintiffs' (and the trial court's) interpretation of Section 2.4 – where Plaintiffs could duly "assert" a claim by simply commencing an action without otherwise notifying Defendants by 2 July 2010 – Plaintiffs could have waited until Defendants had stepped aside as Property managers to notify Defendants of this lawsuit. For instance, under Plaintiffs' and the trial court's interpretation, Plaintiff could have waited until 22 July 2010 to file their Complaint (pursuant to the 20-day extension provided in Rule 3). And then Plaintiffs could have waited *at least* until September 2010 to serve their Summons/Complaint on Defendants. In fact, by taking advantage of Rule 4(d) of our Rules of Civil Procedure, Plaintiffs could have kept Defendants in the dark about their intentions well into 2011 by extending the Summons or suing out successive alias and pluries summonses. In other words, based on Plaintiffs' interpretation, it would have been possible that Defendants have completed their agreement to fully step aside as Property managers and that Plaintiffs' chosen manager would have fully been in place as manager without Defendants ever having any knowledge that Plaintiffs still intended to assert claims against them.

It may be argued that time was not of the essence with regard to the 2 July 2010 deadline. In other words, if time was not of the essence with respect to the 2 July 2010 date, Plaintiffs had a reasonable time after 2 July 2010 to provide the written notice to Defendants. However, Plaintiffs failed to make any such argument either to the trial court or on appeal to our Court. Therefore, any argument that time was not of the essence is waived. N.C. R. App. P. 28.

But assuming that the argument was preserved, we believe that time *was* of the essence and 2 July 2010 was a hard deadline. Section 2.4 of the Settlement Agreement, which essentially provided Plaintiffs with a unilateral option to exclude claims from the reach of the release, is similar to an option contract to purchase real estate. In an option contract, the potential buyer pays consideration for the "option," but not the obligation, to purchase certain real estate at a specified price if exercised by a specified date. And our Supreme Court has stated that time is automatically of the essence as to the option date in such contracts. *See Ferguson v. Phillips*, 268 N.C. 353, 355, 150 S.E.2d 518,

520 (1966) ("Options being unilateral in their inception are construed strictly in favor of the maker, because the other party is not bound to performance[.]"). Similarly, under the Settlement Agreement, Plaintiffs were given the unilateral option to back out of its obligation to release Defendants from all claims. They could simply notify Defendants that they did not want to release claims. Defendants, on the other hand, did not have the option to back out unilaterally. Rather, they could only do so if Plaintiffs first decided to back out.

Additionally, we believe that the Settlement Agreement, when read as a whole, otherwise suggests that the parties intended for 2 July 2010 to be of the essence. Specifically, the Settlement Agreement provided that the statutes of limitations regarding any potential claims would not be tolled beyond 2 July 2010. And, as our Supreme Court has recognized, "[s]tatutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of [a] plaintiff's cause of action." *Pearce v. N.C. Highway*, 310 N.C. 445, 451, 312 S.E.2d 421, 425 (1984).

We note Plaintiffs' brief contains an argument that Defendants waived the "notice" requirement contained in Section 2.4 of the Settlement Agreement based on Defendants' "previous position that their own obligations under the Settlement Agreement had been voided under this same language in Section 2.4." In support of their argument, Plaintiffs cite to statements made by an employee during the course of this litigation and quote *McDonald v. Medford*, 111 N.C. App. 643, 648, 433 S.E.2d 231, ___ (1993) that "[w]here parties, through their actions, have placed a practical interpretation on their contract after executing it, the courts will ordinarily give it that construction[.]" However, Plaintiffs do not state what "actions" Defendants took to indicate that they were voiding their obligations under Section 2.4. They do not point to anything in the record which suggests that Defendants attempted to step back in as Property managers once they became aware of this lawsuit. And the trial court did not make any findings to that effect. On the contrary, in their Answer, Defendants expressly assert that all Plaintiffs' claims had been settled and released by virtue of the Settlement Agreement. Accordingly, we conclude that Plaintiffs have failed to demonstrate from the record that a genuine issue of material fact exists that Defendants waived the notice provision contained in Section 2.4 of the Settlement Agreement.

V. Conclusion

We conclude that all of Plaintiffs claims against Defendants concerning the Property are barred by operation of the Settlement Agreement.

The trial court, though, only granted Defendants' motion for summary judgment in part, allowing the NC Securities Claims to proceed. Therefore, we affirm in part and reverse in part the trial court's order. We remand that matter to the trial court with instructions to enter judgment in favor of Defendants on all claims asserted by Plaintiffs.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Judges BRYANT and TYSON concur.

NNN DURHAM OFFICE PORTFOLIO 1, LLC; ET AL., PLAINTIFFS
v.
HIGHWOODS REALTY LIMITED PARTNERSHIP; HIGHWOODS DLF 98/29, LLC; HIGHWOODS DLF, LLC; HIGHWOODS PROPERTIES, INC.; GRUBB & ELLIS |THOMAS LINDERMAN GRAHAM; AND THOMAS LINDERMAN GRAHAM INC., DEFENDANTS

No. COA17-756

Filed 4 September 2018

1. Real Property—Securities Act—primary liability claims—sufficiency of claims

In a complex business case involving the sale of tenant-in-common (TIC) like-kind interests in multiple parcels of real property, the business court did not err in dismissing plaintiff purchasers' primary liability claims asserted against the seller and broker (defendants) under the Securities Act because the transfer of the real property deed did not constitute the sale of a security. The TIC interests were created, offered, and sold to plaintiffs from a third-party entity, which provided the investment materials plaintiffs relied on. Plaintiffs did not state a proper claim under the Act because they did not allege that defendants solicited plaintiffs or promoted the sale of TIC interests in order to sell them securities.

2. Real Property—Securities Act—secondary liability claims—N.C.G.S. § 78A-56(c)—material aid

In a complex business case involving the sale of tenant-in-common like-kind interests in multiple parcels of real property, the business court did not err in granting summary judgment for a seller and broker (defendants) on plaintiff purchasers' secondary liability claims under section 78A-56(c) of the Securities Act after determining that defendants did not materially aid a third-party

investment company's presentation of facts regarding the properties in its private-placement memorandum (PPM) which plaintiffs relied on when deciding to purchase. No argument was made or evidence presented to indicate that defendants owed a duty to make any disclosures directly to plaintiffs, nor was there proof that defendants actually knew of any alleged misrepresentations in the PPM.

3. Fraud—common law—real property transaction—justifiable reliance

In a complex business case involving the sale of tenant-in-common like-kind interests in multiple parcels of real property, the business court did not err in dismissing plaintiff purchasers' common law claims asserted against the seller and broker (defendants) for common law fraud, fraud in the inducement, or negligent misrepresentation because plaintiffs' theory of indirect reliance was not sufficient to meet the element that they justifiably relied on defendants' misrepresentations which were passed through a third-party investment company. Plaintiffs could not transfer reliance that the third-party investment company placed on defendants' confidential offering memorandum (COM) to plaintiffs' own reliance on the private-placement memorandum drafted by the third party, where the two memoranda contained different lease renewal probabilities affecting the analysis of cash flow projections from the properties' commercial tenants, undermining plaintiffs' claims, and there was no allegation or evidence that any of the plaintiffs saw the COM itself.

Appeal by plaintiffs from orders entered 19 February 2013, 7 December 2016, and 3 January 2017 by Chief Business Court Judge James L. Gale in Durham County Superior Court. Heard in the Court of Appeals 6 March 2018.

Stark Law Group, PLLC, by Thomas H. Stark and Seth A. Neyhart, and Penry Riemann, PLLC, by Andy Penry, for plaintiff-appellants.

Ellis & Winters LLP, by Jonathan D. Sasser, Jeremy M. Falcone, James M. Weiss, and Emily E. Erixson, for defendant-appellees Highwoods Realty Limited Partnership; Highwoods DLF 98/29, LLC; and Highwoods Properties, Inc.

Manning, Fulton & Skinner, P.A., by Michael T. Medford and J. Whitfield Gibson, for defendant-appellees Thomas Linderman Graham, Inc. and Grubb & Ellis|Thomas Linderman Graham.

North Carolina Department of Secretary of State, by Enforcement Attorney Colin M. Miller, for amici curiae, the North Carolina Secretary of State and the North American Securities Administration Association, Inc.

TYSON, Judge.

Plaintiffs appeal from orders granting (1) Defendants' motions to dismiss, except for denial of Defendants' motion to dismiss Plaintiffs' claim of secondary liability under the North Carolina Securities Act; (2) Defendants' motions for judgment on the pleadings; and, (3) Defendants' motions for summary judgment.

I. Background

A. Factual Background

Plaintiffs, NNN Durham Office Portfolio 1, LLC, et al., are purchasers of tenant-in-common ("TIC") interests in five parcels of real property located in Durham, North Carolina (the "Property"). Plaintiff LLCs are all Delaware limited liability companies, which are registered with the North Carolina Secretary of State. Plaintiffs include the individual purchasers and LLCs formed by the individuals for the purpose of purchasing their TIC real property interests and through which these interests were purchased. Only three Plaintiff TIC owners are North Carolina residents (the "North Carolina Plaintiffs").

The Property consists of tracts of real property improved with five medical office and clinic buildings owned at relevant times by Defendant Highwoods DLF 98/29, LLC, a Delaware-chartered corporation with its principal place of business in Raleigh, North Carolina, and the successor-in-interest to the seller of the Property, Highwoods DLF 98/29, L.P. Defendant Highwoods DLF, LLC, a Delaware LLC, was the sole general partner of Highwoods DLF 98/29, L.P. (collectively, "Highwoods").

In 2006, the Property's two primary tenants were Duke Pediatrics and Duke's Patient Revenue Management Organization ("Duke PRMO"), both of which are affiliated with Duke University Health System, Inc. (collectively, "Duke"). Duke PRMO occupied over 54% of rentable space in the Property, including a sublease with Qualex, Inc. Duke PRMO's sublease term was due to expire in February 2009, and its term of leases in the other two buildings were scheduled to expire in June 2010.

In the spring of 2006, Highwoods approached Defendant Thomas Linderman Graham Inc. ("TLG"), a North Carolina-based commercial

real estate company, which conducted business under the trade name Grubb & Ellis | Thomas Linderman Graham, about selling the Property. Highwoods and TLG entered into an exclusive listing agreement on 24 October 2006 for TLG to analyze, market, and broker a sale of the Property. TLG prepared a Confidential Offering Memorandum ("COM"), dated 6 December 2006, for prospective buyers of the Property. The COM disclosed that the terms of the leases for the Property's tenants were set to expire in 2009 and 2010 and contained no renewal options. The COM also contained a series of "renewal probabilities" for each of the current tenants, including Duke PRMO. The COM's terms provided that the information contained therein was "being provided solely to facilitate the Prospective Purchaser's own due diligence for which it shall be fully and solely responsible."

In April 2006, TLG representative Jim McMillan settled on a "fairly conservative" projected valuation for the Property of between $30.2 to $31.3 million, recognizing that "[a]ll in all, a big part of th[e] sale will be the environment the properties sit in and the likelihood an[ ] investor believes Duke is there for the long run."

In September 2006, Duke PRMO began considering a possible relocation from the Property and retained Corporate Realty Advisors to help solicit bids to build a new Duke PRMO facility. On or about 12 September 2006, Highwoods' parent company, Highwoods Properties, Inc., made an informal proposal for a build-to-suit building for Duke PRMO to be ready by July 2008. Discussions occurred between Highwoods and Duke PRMO's broker about possible relocation out of the Property. In October 2006, Duke PRMO issued a request for proposals ("RFP") for a build-to-suit replacement building.

On 6 December 2006, Highwoods Properties, Inc. formally submitted to Duke a proposal to build a new facility for Duke PRMO. The COM did not disclose any information about Duke PRMO's RFPs for a build-to-suit building or Highwoods Properties' proposal.

On 21 December 2006, Triple Net Properties, LLC ("Triple Net") submitted the winning bid of $34.2 million to TLG for the purchase of the Property. Triple Net's final bid indicated its intention to purchase the Property with money raised through a TIC like-kind investment structure pursuant to Section 1031 of the Internal Revenue Code. *See* 26 U.S.C. § 1031 (2018).

The day before submitting its final bid, Triple Net emailed McMillan, and asked why Duke had not yet renegotiated its leases and for assurance

of Duke's continued leasing of the Property. McMillan responded that day, stating there was no known reason why Duke had not been negotiating new leases. McMillan also stated that the "location works very well for [Duke] and they are well entrenched there," Duke had been expanding into its current buildings, and no other location in the area could accommodate Duke's needs.

The next day, on 22 December 2006, McMillan informed Triple Net that Highwoods had chosen Triple Net as the purchaser.

On 5 January 2007, Triple Net prepared a private-placement memorandum ("PPM") and other offering materials for prospective investors in order to sell TIC interests to Section 1031 like-kind exchange buyers. The PPM disclosed the objectives, risks, and terms associated with investing in the Property and included various proposed controlling agreements, including a TIC Agreement and Management Agreement (collectively, "the Agreements").

The PPM stated that to participate in the investment, each investor was required to complete a TIC purchaser questionnaire, which cautioned them to carefully read the PPM. The PPM contained eighteen pages of risk factors, specifically including disclosures and warnings that the Property carried a large dependence on one tenant, Duke, and the expiration dates and terms of Duke's leases.

Under the risk factor "Large Dependence on One Tenant," the PPM explained that "[a]ny large-scale departure by Duke [from the Property] would significantly affect the cash flow and fair market value of the Property" and without Duke, the income would not cover the loan payments, the lender could foreclose, and investors could suffer a complete loss of their investment. The Risk Factors also included a statement that "[**u**]**nless extended, leases with all of the tenants, representing 100% of the Property, will expire within the next 3 calendar years**." (Emphasis original).

Between 9 January 2007, when Highwoods provided the due diligence materials, and 24 January 2007, when the final purchase agreement was executed, Triple Net continued its due diligence efforts. During that time, Triple Net secured a due diligence report and an independent property appraisal and interviewed the Property's tenants, including Duke's representative Scott Selig.

On 19 January 2007, a meeting was held between Mike Waddell of Triple Net, Selig of Duke, and Charles Ostendorf and David Linder, both of Highwoods. After the meeting, Ostendorf took Waddell on a tour of

the Property. Afterwards, Ostendorf stated he did not envision Duke would move if they were provided a "very economical long term deal."

On 24 January 2007, Triple Net and Highwoods executed the Purchase Sale Agreement for the Property. By 12 March 2007, Triple Net had recruited a group of TIC like-kind exchange investors to invest in the Property. The sale closed on 12 March 2007, and a deed was recorded in Durham County Registry conveying title of the Property from Defendant Highwoods DLF 98/29, L.P. to Plaintiffs and other entities as tenants-in-common.

In November 2007, Duke announced its decision not to renew Duke PRMO's leases beyond their expiration date in June 2010. Duke PRMO vacated the Property on 12 December 2008. Duke Pediatrics renewed its lease for another seven years and remains a tenant at the Property.

In April 2011, the lender initiated foreclosure proceedings on the Property. In October 2011, the Property was sold by upset bid at a public foreclosure sale, and on 20 December 2011, it was conveyed to the highest bidder.

B. Procedural Background

Plaintiffs initially filed a complaint against Defendants Highwoods and TLG on 1 April 2010, but voluntarily dismissed that action without prejudice on 6 July 2011 after the case had been designated a mandatory complex business case by the Chief Justice of North Carolina. On 6 July 2012, Plaintiffs filed their present complaint. On 19 February 2013, the Business Court granted Defendants' motions to dismiss Plaintiffs' claims of fraud, fraud in the inducement, unfair and deceptive trade practices, negligent misrepresentation, and punitive damages, but denied Defendants' motions to dismiss Plaintiffs' claims of secondary liability under N.C. Gen. Stat. § 78A-56(c)(2) of the North Carolina Securities Act and conspiracy to violate that Act ("February 2013 order").

On 15 November 2013, Highwoods moved for partial summary judgment on the question of whether the TICs' investments in the Property qualified as a sale of securities under the Securities Act. The Business Court deferred ruling on that motion until discovery had concluded.

On 29 May 2015, Defendants filed Rule 12(c) motions for judgment on the pleadings concerning the claims of the fifty-five out-of-state Plaintiffs on the grounds that those Plaintiffs had not alleged they had received or accepted an offer to sell a security in North Carolina, and cannot recover under the North Carolina Securities Act.

The parties filed cross-motions for summary judgment on 17 August 2015. Defendants filed motions for summary judgment on all remaining claims pending against them. Plaintiffs moved for partial summary judgment on their claim of secondary liability under the Securities Act. Also on 17 August 2015, Plaintiffs filed a North Carolina Rules of Civil Procedure, Rule 54(b) motion seeking the Business Court to modify its February 2013 order to reinstate Plaintiffs' punitive damages claim.

C. The Business Court's Orders

The Business Court held a joint hearing on the summary judgment motions and on Plaintiffs' Rule 54(b) motion on 23 November 2015. On 5 December 2016, the Business Court entered an Order and Opinion ("5 December 2016 order"). On 21 December 2016, Plaintiffs filed a motion pursuant to Rule 54 to certify the Business Court's order as a final judgment in this case. On 29 December 2016, the Business Court issued its Revised Order & Opinion and Final Judgment ("29 December 2016 revised order"). The 29 December 2016 revised order varies from the 5 December 2016 order only insofar as it certifies the revised order as a final judgment pursuant to Rule 54(b).

In pertinent part, the 29 December 2016 revised order granted Defendants' Rule 12(c) motions, denied Plaintiffs' motion for partial summary judgment against Defendants for primary liability under N.C. Gen. Stat. § 78A-56(a), and granted summary judgment to Defendants on Plaintiffs' secondary liability claims under N.C. Gen. Stat. § 78A-56(c).

On 30 December 2016, Plaintiffs filed timely notice of appeal from the February 2013 order, the 5 December 2016 order, and the 29 December 2016 revised order.

II. Jurisdiction

Appeal lies of right in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) (2013) and 1-277 (2017). This case was designated a complex business case on 11 July 2012, prior to the effective date of the 2014 amendments designating a right of appeal from a final judgment of the Business Court directly to the Supreme Court of North Carolina. *See* 2014 N.C. Sess. Laws 621, ch. 102, § 1.

III. Issues

Plaintiffs argue the Business Court erred by (1) granting Defendants' motion for judgment on the pleadings against out-of-state Plaintiffs under N.C. Gen. Stat. § 78A-63(a); (2) dismissing Plaintiffs' claims against Defendants for primary liability under N.C. Gen. Stat. § 78A-56(a);

(3) granting summary judgment to Defendants on Plaintiffs' secondary liability claims under N.C. Gen. Stat. § 78A-56(c); and (4) dismissing Plaintiffs' common law claims.

In their brief, Plaintiffs also argue the Business Court erred in dismissing their other North Carolina Securities Act claims pursuant to sections 78A-12(a)(5) and 78A-56(b1). However, Plaintiffs acknowledge that the Business Court "did not address Defendants' civil liability under N.C. Gen. Stat. § 78A-12." The Business Court stated it was dismissing all Plaintiffs' claims under the Securities Act, other than Plaintiffs' claims under N.C. Gen. Stat. § 78A-56(c)(2). Plaintiffs assert they raised the issue on summary judgment and requested the Business Court reconsider it pursuant to Rule 54(b). Plaintiffs' Rule 54(b) motion was denied as moot. As a result, this question is not properly before this Court, and we need not address it.

IV. Standards of Review

Plaintiffs appeal from the Business Court's partial grant of summary judgment in favor of Defendants, grant of certain of Defendants' 12(b)(6) motions to dismiss, and grant of Defendant's motions for judgment on the pleadings.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003) (citation and internal quotation marks omitted), *aff'd per curiam*, 358 N.C. 137, 591 S.E.2d 520 (2004).

"Judgment on the pleadings, pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Builders Mut. Ins. Co. v. Glascarr Props., Inc.*, 202 N.C. App. 323, 324, 688 S.E.2d 508, 510 (2010) (quoting

Groves v. Cmty. Hous. Corp., 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001)). "In deciding such a motion, the trial court looks solely to the pleadings. The trial court can only consider facts properly pleaded and documents referred to or attached to the pleadings." *Id.* at 324-25, 688 S.E.2d at 510 (quoting *Reese v. Mecklenburg Cty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 37-38 (2009)). "This Court reviews *de novo* a trial court's ruling on motions for judgment on the pleadings." *Id.* at 325, 688 S.E.2d at 510 (quoting *Reese*, 200 N.C. App. at 497, 685 S.E.2d at 38).

"The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief must be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted).

V. Analysis

A. Plaintiffs' Claims Under N.C.G.S. §78A-56(a)

[1] Plaintiffs argue the Business Court erred by dismissing Plaintiffs' primary liability claims under N.C. Gen. Stat. § 78A-56(a) against Defendants. We disagree.

The Business Court found primary liability is imposed upon a person or entity who sells or offers for sale a security. Plaintiffs did not allege Defendants solicited Plaintiffs in order to offer or sell them securities. Further, any privity between Defendants and Plaintiffs resulting from the transfer of real property interests by deed does not create any liability for Defendants as purported sellers of securities. As the Business Court concluded, "The critical fact is not Highwoods' transferring the fractional real estate interests to Plaintiffs, but instead is Plaintiffs' entrusting those fractional interests to Triple Net in exchange for investment returns."

We agree with the Business Court's reasoning and conclusion that Plaintiffs have not stated a claim of primary liability under the North Carolina Securities Act against Defendants. Without more, i.e., soliciting Plaintiffs or promoting the sale of TIC interests, Defendants cannot automatically or statutorily be deemed to be sellers of securities simply as a result of Highwoods' deeding the real property to them. Triple Net requested and assigned its contract with Highwoods for it to deed the property directly to Plaintiffs. Plaintiffs cannot establish liability, even if all parties, including Defendants, knew or should have known that Triple Net as buyer was a syndicator and that the fractional interests

Highwoods deeded to Plaintiffs would be entrusted to Triple Net in exchange for investment returns. *Cf. S.E.C. v. Apuzzo*, 689 F.3d 204, 214 (2d Cir. 2012) (concluding the complaint plausibly alleged that the defendant provided substantial assistance to the primary violator under the federal securities law by agreeing to participate in the transactions at issue, negotiating the details of the transactions, and, *inter alia*, approving or knowing about the issuance of inflated invoices).

Highwoods' sole interaction with Plaintiffs was to deed the TIC interests in the real property to them at Triple Net's request and assignment. "The principle function of a deed is to evidence the transfer of a particular interest in land . . . ." *Strange v. Sink*, 27 N.C. App. 113, 115-16, 218 S.E.2d 196, 198 (1975). When a deed fulfills all the provisions of the contract, the executed contract then merges into the deed. *Biggers v. Evangelist*, 71 N.C. App. 35, 38, 321 S.E.2d 524, 526 (1984) (citations omitted). This deed transfer by Highwoods and recordation was a sale of real property and did not constitute the sale of a security.

Triple Net created, offered, and sold the TIC interests to Plaintiffs. Triple Net drafted the PPM, which contained the alleged misrepresentations and omissions upon which Plaintiffs based their securities law claims, without the participation of Defendants. The Business Court correctly granted Defendants Highwoods and TLG's motion to dismiss Plaintiffs' primary liability claims under the North Carolina Securities Act. Plaintiff's arguments are overruled.

B. Summary Judgment to Defendants on Secondary Liability Claims

[2] Plaintiffs contend the Business Court erred by granting summary judgment to Defendants on Plaintiffs' secondary liability claims under N.C. Gen. Stat. § 78A-56(c). Plaintiffs argue the Business Court's narrow construction of the term "material aid" under section 78A-56(c)(2) is an error of law, and that at the very least, Plaintiffs' evidence tends to show material issues of fact exist. We disagree.

The Securities Act imposes two essential elements for secondary liability: (1) the "material aid" requirement, and (2) the "actual knowledge" requirement. N.C. Gen. Stat. § 78A-56(c)(2) (2017). In construing the material aid requirement, the Business Court in its 19 February 2013 order concluded:

> {78} There is no case law in North Carolina construing the concept of aiding and abetting a securities violation. In fact, there is limited North Carolina law examining aider and abettor liability in any civil context. North Carolina

> has at least in some instances adopted the Restatement (Second) of Torts § 876, which incorporates the "substantial assistance" standard. *See Tong v. Dunn*, 2012 NCBC LEXIS 16, at *26 n.3 (N.C. Super. Ct., Mar. 19, 2012); RESTATEMENT (SECOND) OF TORTS § 876 (1979). However, the North Carolina Court of Appeals has indicated that § 876 should be applied restrictively, and that aiding and abetting is considered in the nature of inciting conduct or taking concerted action. *Hinson v. Jarvis*, 190 N.C. App. 607, 611-13, 660 S.E.2d 604, 608 (2008). This court has stated that if a claim for aiding and abetting a breach of fiduciary duty exists at all, it will require proof that the "aiding and abetting party [] have the same level of culpability or scienter" as the primary tort-feasor. *Tong*, 2012 NCBC LEXIS 16, at *26 (citing *Sompo Japan Ins. Inc. v. Deloitte & Touche, LLP*, 2005 NCBC LEXIS 1, at *12 (N.C. Super Ct., June 10, 2005)).

Since that order was entered, only one case has dealt with the issue of aiding and abetting a securities violation, *Piazza v. Kirkbride*, 246 N.C. App. 576, 785 S.E.2d 695, *disc. review allowed*, 369 N.C. 37, 794 S.E.2d 316 (2016), and the Court only elaborated on the burden a plaintiff bears in proving secondary liability:

> The first subsection, N.C. Gen. Stat. § 78A-56(a), imposes primary liability on "any person" who offers or sells a security. If primary liability exists, then secondary liability may be imposed upon "control persons," enumerated in N.C. Gen. Stat. § 78A-56(c)(1), or upon persons not included in section 78A-56(c)(1) who "materially aid[ ]" in the transaction basing primary liability. N.C. Gen. Stat. § 78A-56(c)(2).The secondarily liable parties are "jointly and severally" liable "to the same extent" as the primarily liable person. N.C. Gen. Stat. § 78A-56(c)(1)-(2). *This differentiation matters because a plaintiff bears a higher burden of proof in proving secondary liability for a person outside of section 78A-56(c)(1) who "materially aids" in the transaction.*

246 N.C. App. at 597-98, 785 S.E.2d at 709 (emphasis supplied).

In its 29 December 2016 revised judgment and order, the Business Court relied upon its earlier order in analyzing the "material aid" requirement and concluded that Highwoods' mere transfer of a real property interest by deed alone did not constitute "material aid" within the scope

of the Securities Act. The Business Court also concluded that "the evidence of record, viewed in the light most favorable to Plaintiffs, does not allow for a conclusion that either Highwoods or TLG knew of and then materially aided or substantially assisted in Triple Net's expression of the opinion upon which the North Carolina Plaintiffs base their primary-liability claim."

Under federal securities law, the United States Court of Appeals for the Fourth Circuit has noted that "[a]bsent a [defendant's] duty to disclose, allegations that a defendant knew of the wrongdoing and did not act fail to state an aiding and abetting claim." *Schatz v. Rosenberg*, 943 F.2d 485, 496 (4th Cir. 1991) (citations omitted). In other words, pursuant to the provision of the federal securities law comparable to N.C. Gen. Stat. § 78A-56(c)(2), absent a duty that Highwoods and TLG owed to Plaintiffs, any allegations that Highwoods and TLG purportedly knew of any wrongdoing perpetrated by Triple Net, but failed to act to inform Plaintiffs of that wrongdoing, would nevertheless fail to state a claim for secondary liability. *See id.* (holding that the plaintiffs had not pled an aider and abettor claim because they did not adequately allege that defendant "substantially assisted" the primary violator even where the defendant failed to disclose or correct misrepresentations, participated in negotiations and drafting documents, and conducted the closing at its offices); *see also Venturtech II v. Deloitte Haskins & Sells*, 790 F. Supp. 576, 589 (E.D.N.C. 1992) (dismissing aiding and abetting claims against [accountants] because the plaintiffs "ha[d] not presented any evidence indicating that [the accountants] conducted [their] audits with a 'high conscious intent' to aid a securities violation").

Nothing in the record indicates, and no party argues, that Defendants owed any duty to disclose anything directly to Plaintiffs. Additionally, "the PPM expressly advise[d] any potential purchaser that statements in the PPM must be assumed to have been based solely on Triple Net's own due diligence." Furthermore, as the Business Court correctly stated, "there is no proof that [Highwoods and TLG] '*actually knew* of the existence of the facts by reason of which the [primary] liability is alleged to exist,' " namely, the alleged misrepresentations Triple Net purportedly made in the PPM. (Emphasis supplied).

Based upon all of the record evidence, including the Business Court's analysis of the applicable law, we agree with the Business Court's conclusion that "Plaintiffs have failed to offer proof that either Highwoods or TLG provided material aid with the requisite actual knowledge under the Securities Act." Therefore, the Business Court did not err in granting Defendants' motions for summary judgment and dismissing Highwoods

and TLG from the instant case with prejudice. Plaintiffs' argument is overruled.

C. Judgment on the Pleadings Against Out-of-State Plaintiffs

Plaintiffs argue the Business Court erred by granting Defendants' Rule 12(c) motion for judgment on the pleadings against the fifty-five out-of-state Plaintiffs under N.C. Gen. Stat. § 78A-63(a). They assert this Court should hold that all Plaintiffs, including the out-of-state Plaintiffs, are eligible to proceed on their claims under a proper interpretation of N.C. Gen. Stat. § 78A-56.

Plaintiffs also argue that because the offering at issue in this case was made nationwide, including solicitations to North Carolina citizens who received communications within North Carolina, the requirements of N.C. Gen. Stat. § 78A-63(a) were met for the entire offering and apply to all Plaintiffs. As a result, Plaintiffs argue, civil liability arises for Defendants under sections 78A-56(a) and 78A-56(c) to "any person" who purchased securities, whether or not they received their offer in North Carolina. Because we otherwise affirm the Business Court's orders, which effectively disposed of the lawsuit by granting judgment in favor of Defendants, this argument is moot.

D. Plaintiffs' Common Law Claims

[3] Lastly, Plaintiffs argue the Business Court erred by dismissing their common law claims for fraud, fraud in the inducement, and negligent misrepresentation because Plaintiffs assert they adequately pled justifiable reliance against Defendants. Plaintiffs also argue the Business Court erred by holding that no fraud claims based on indirect reliance are recognizable under North Carolina law.

Regarding Plaintiffs' common law claims, the Business Court concluded "that Plaintiffs have not stated a claim for common law fraud, fraud in the inducement, or negligent misrepresentation because they have not adequately alleged justifiable reliance, which is an element for each of these claims." The Business Court found and concluded Plaintiffs could not transfer any reliance Triple Net had on Defendants Highwoods and TLG's COM to Plaintiffs' reliance on Triple Net's PPM.

Further, "[t]he COM also specifically states that it is being provided only to potential purchasers of 'the interest described herein,' which is purchase of the Subject Property." Finally the Business Court concluded,

> [t]o the extent that Plaintiffs want to incorporate Triple Net's reliance on Defendants, they must be constrained by

> the general rule of no duty to speak and by the established rule that when "the purchaser has full opportunity to make pertinent inquiries but fails to do so through no artifice or inducement of the seller, an action in fraud will not lie." *C.F.R. Foods, Inc.* [*v. Randolph Development Co.*], 107 N.C. App. [584,] 589, 421 S.E.2d [386,] 389 (quoting *Libby Hill Seafood Rests., Inc. v. Owens*, 62 N.C. App. 695, 698, 303 S.E.2d 565, 568 (1983)). (Footnotes omitted).

We agree with the Business Court's review and reasoning, particularly its conclusion that "Plaintiffs cannot transfer Triple Net's reliance on the COM to their reliance on the PPM. *See Raritan River Steel Co. v. Cherry, Bekaert & Holland, Gen. P'ship*, 322 N.C. 200, 205–07[, 367 S.E.2d 609, 612] (1988)."

"The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan*, 322 N.C. at 206, 367 S.E.2d at 612 (citations omitted). In *Raritan*, the Supreme Court of North Carolina rejected the concept of indirect reliance or "reliance by proxy" for purposes of common law misrepresentation claims. *Id.* In that case, the plaintiffs allegedly relied upon financial information in a report that was based on faulty financial statements, prepared by an accountant, but the plaintiffs did not rely on the faulty financial statements *themselves*. *Id.* at 205, 367 S.E.2d at 612. The Supreme Court concluded "that a party cannot show justifiable reliance on information contained in audited financial statements without showing that he relied upon the actual financial statements themselves to obtain this information." *Id.* at 206, 367 S.E.2d at 612.

Plaintiffs have alleged Defendants' actively concealed and misrepresented facts to Triple Net, and Defendants knew Triple Net was repeating their misrepresentations to TIC purchasers. Plaintiffs assert they have stated a valid claim for fraud, which distinguishes negligent statements from those known to be false. We disagree.

The COM, issued by Defendants Highwoods and TLG, when compared with the PPM issued by Triple Net, contained different renewal probabilities for the cash flow projections and assumptions, which undermine Plaintiffs' fraud claim. Defendants Highwoods and TLG's COM included a 75% default renewal rate in its assumptions for four of the five buildings, and a 90% renewal rate in its assumption for the fifth building. By contrast, Triple Net's PPM projected lower probable rates of renewal, a 50% renewal for one building and a 75% renewal for

the others. In other words, the very statements in Highwoods and TLG's COM that Plaintiffs claim were misrepresentations upon which they indirectly relied were not copied and republished by Triple Net in the PPM. Triple Net also retained an independent appraiser to provide an appraisal and opinion of the value of the Property.

Furthermore, no Plaintiff ever alleges they saw the Defendants Highwoods and TLG's COM itself. No Plaintiff directly relied upon the information in the COM to make their investment. Even presuming misrepresentations, or outright falsehoods, existed in the COM produced by Defendants Highwoods and TLG, Plaintiffs could not have relied on the COM, a document they had never seen, and which was not republished, copied verbatim, or incorporated into the PPM, which reached different conclusions. *See id.* at 205-06, 367 S.E.2d at 612.

The Business Court did not err in granting Defendants' motions to dismiss Plaintiffs' common law claims for fraud, fraud in the inducement, and negligent misrepresentation. Plaintiffs' arguments are overruled.

VI. Conclusion

We affirm the Business Court's orders dismissing Plaintiffs' claims against Defendants Highwoods and TLG for primary liability under N.C. Gen. Stat. § 78A-56(a), granting summary judgment to Defendants Highwoods and TLG on Plaintiffs' secondary liability claims under N.C. Gen. Stat. § 78A-56(c), and dismissing Plaintiffs' common law claims. Because of our holding, which dismisses all statutory and common law claims against Defendants Highwoods and TLG, Plaintiffs' appeal of Defendants' motion for judgment on the pleadings against out-of-state Plaintiffs under N.C. Gen. Stat. § 78A-63(a) is moot. *It is so ordered.*

AFFIRMED.

Judges BRYANT and DILLON concur.

MARIO SEGURO-SUAREZ, BY AND THROUGH HIS GUARDIAN AD LITEM, EDWARD G. CONNETTE, PLAINTIFF

v.

KEY RISK INSURANCE COMPANY, JOSEPH J. ABRIOLA, SHARON SOSEBEE, SUZANNE MCAULIFFE, CHERYL GLESS, ROBERT E. HILL AND CAROLINA INVESTIGATIVE SERVICES, INC., DEFENDANTS

No. COA17-697

Filed 4 September 2018

1. Jurisdiction—tort claims—tangentially related to worker's compensation claim—trial court divisions

Tort claims including malicious prosecution asserted by an employee against an insurance company and others arising from a criminal prosecution against him for obtaining worker's compensation benefits by false pretenses, while tangentially related to the employee's worker's compensation claim, were properly brought in the superior court. The N.C. Industrial Commission has exclusive jurisdiction only for claims arising from the processing and handling of a worker's compensation claim, whether intentional or negligent, but its jurisdiction does not extend to claims based on acts occurring outside the course of a worker's compensation proceeding.

2. Malicious Prosecution—initiation of prosecution—intervening independent prosecutorial discretion—motivation for providing information to law enforcement

Plaintiff's complaint for malicious prosecution contained sufficient allegations that defendants initiated prosecution against him, by alleging defendants knowingly provided incomplete, false, and misleading information to law enforcement which caused plaintiff to be charged with obtaining property by false pretenses and insurance fraud for pursuing worker's compensation benefits. Although law enforcement and prosecutors exercise discretion in deciding which cases to prosecute, a person who knowingly provides false information to authorities may be found to have initiated prosecution, and is not protected by the rule that citizens who make reports in good faith, even if incompletely or inaccurately, may do so without fear of retaliation.

3. Abuse of Process—malicious misuse of process after issuance—sufficiency of allegations

Plaintiff alleged sufficient allegations for abuse of process by alleging that after he was charged and arrested for obtaining

property by false pretenses and insurance fraud for pursuing and taking worker's compensation benefits, defendants caused criminal proceedings to be continued against him for the purpose of recouping funds.

4. Unfair Trade Practices—privity of contract—insurance company of adverse party—third party an intended beneficiary of insurance contract

Plaintiff's claim for unfair and deceptive trade practices (UDTP) was not barred for lack of privity of contract where defendant insurance carrier was already obligated to pay him his workers' compensation benefits at the time it committed tortious conduct by initiating a malicious prosecution against him. The rule that a third-party claimant has no cause of action against the insurance company of an adverse party for UDTP does not apply to employees who are, pursuant to statute, the intended beneficiaries of their employers' compulsory insurance policies.

5. Torts, Other—bad faith—insurance carrier—refusal to pay claim

Plaintiff failed to state a claim for bad faith against his employer's insurance carrier because he did not allege that the carrier refused to pay his valid worker's compensation claim.

6. Conspiracy—civil—insurance company—intra-corporate immunity rule

Plaintiff's assertion that the insurance company paying his worker's compensation benefits conspired with several of its employees to maliciously prosecute him for allegedly taking benefits under false pretenses did not give rise to a valid claim for civil conspiracy, since a corporation cannot conspire with itself.

7. Damages and Remedies—punitive damages—tort claims—sufficiency of allegations

Plaintiff adequately alleged punitive damages pursuant to N.C.G.S. § 1D-15 where his tort claims for malicious prosecution, abuse of process, and unfair and deceptive trade practices (arising from defendants' initiation of a criminal prosecution against plaintiff for obtaining property by false pretenses and insurance fraud for taking worker's compensation benefits on false pretenses) survived defendants' motion to dismiss and he alleged malicious, fraudulent, willful, and wanton conduct.

Appeal by Defendants Key Risk Insurance Company, Joseph J. Abriola, Sharon Sosebee, Suzanne McAuliffe, and Cheryl Gless from Order entered 30 January 2017 by Judge Jesse B. Caldwell, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 February 2018.

Edwards Kirby L.L.P., by David F. Kirby and William B. Bystrynski, for Plaintiff-Appellee.

Hedrick Gardner Kincheloe & Garofalo LLP, by Mel J. Garofalo, C. Rob Wilson, Linda Stephens, and M. Duane Jones, for Defendant-Appellants Key Risk Insurance Company, Joseph J. Abriola, Sharon Sosebee, Suzanne McAuliffe, and Cheryl Gless.

INMAN, Judge.

When a North Carolina worker is hurt on the job, his injury is within the exclusive scope of the Workers' Compensation Act and he can obtain relief only by pursuing a claim before the North Carolina Industrial Commission (the "Commission"). But when, after the Commission awards the injured worker benefits, an employer's insurance company knowingly provides false information to police to frame him for insurance fraud, resulting in his arrest, incarceration, and indictment on felony charges, the worker's claims for malicious prosecution, abuse of process, and unfair and deceptive trade practices ("UDTP") exceed the scope of the Workers' Compensation Act and are properly before the General Court of Justice.

Plaintiff Mario Seguro-Suarez ("Plaintiff") brought suit against Defendants Key Risk Insurance Company ("Key Risk"), Joseph J. Abriola, Sharon Sosebee, Suzanne McAuliffe, and Cheryl Gless (collectively the "Individual Defendants" together with Key Risk as "Defendants")[1] for malicious prosecution, abuse of process, UDTP, bad faith, willful and wanton conduct, conspiracy, and punitive damages. Defendants appeal the denial of their motions to dismiss all of Plaintiff's claims pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful review of the record and applicable law, we hold that the trial court did not err in denying the motions to dismiss pursuant to Rule 12(b)(1), but that it did err in failing to dismiss Plaintiff's

1. The other defendants named in the action, Robert E. Hill and Carolina Investigative Services, Inc., did not appeal. We therefore limit our use of "Defendants" in this opinion to Key Risk and the Individual Defendants.

bad faith and civil conspiracy claims under Rule 12(b)(6). We therefore affirm the trial court's order in part, reverse in part, and remand for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

The record below, consisting primarily of the allegations in Plaintiff's complaint, indicates the following:

In 2003, Plaintiff was working for his employer, Southern Fiber, when he fell from a height of approximately 18 feet onto concrete, striking his head. As a result of the fall, Plaintiff suffered several broken bones and severe traumatic brain injury. He was rendered comatose, required intubation and ventilation support to breathe, and underwent emergency neurosurgery at Carolinas Medical Center in Charlotte, North Carolina, to relieve pressure on his brain. He eventually emerged from his coma but the brain injury changed his personality, required physical, speech, and occupational therapy, and Plaintiff currently suffers from significant behavioral and memory deficits, including deficits in executive functioning, problem solving, planning, and balance. Plaintiff's injuries have rendered him dependent on others for: (1) dressing; (2) feeding; (3) toileting; (4) assistance in daily activities; (5) grooming; (6) bathing; and (7) home management. Southern Fiber and Key Risk, as Southern Fiber's insurance carrier, admitted that Plaintiff's injuries were compensable.

While Plaintiff was in inpatient care, Key Risk was informed multiple times that Plaintiff would require 24-hour care upon discharge. Rather than provide for care at an assisted living center or by an at-home professional caregiver, Key Risk and its employees arranged for Plaintiff's 18-year-old daughter, who had immigrated to the United States only two months prior, to assume all home care for Plaintiff. After approximately 11 weeks, Plaintiff's daughter moved him into the home of a family friend, who assumed caregiving duties. Key Risk did not pay Plaintiff's daughter or friend for assuming the 24-hour care of Plaintiff.

Plaintiff saw an authorized treating physician, Dr. Flora Hammond, throughout 2003, 2004, and 2005. Dr. Hammond performed multiple tests on Plaintiff to discern the nature and extent of his condition, with each test showing symptoms consistent with traumatic brain injury. Dr. Hammond also requested an occupational home therapy evaluation, as she recognized that Plaintiff continued to suffer injuries as a result of several falls stemming from his balance issues. Key Risk denied the request and refused to provide the evaluation. Dr. Hammond later requested an evaluation by a neurologist, which Key Risk again declined to provide; instead, Plaintiff was evaluated by Dr. Thomas Gaultieri, a

neuropsychologist. Key Risk refused to authorize continued treatment by Dr. Hammond after Plaintiff was referred to Dr. Gaultieri.

Dr. Gaultieri treated Plaintiff from 2005 to mid-2007. Though he first believed Plaintiff was legitimately suffering from the conditions described above, Key Risk eventually provided Dr. Gaultieri with video footage that convinced him otherwise. The video, cut from 9 hours of surveillance footage taken by Key Risk over a six-month period and edited down to 45 minutes, led Dr. Gaultieri to opine that Plaintiff was willfully exaggerating his symptoms and that he needed no further treatment.

The above conduct by Key Risk in administering Plaintiff's care for an admittedly compensable injury led to considerable litigation. In 2008, a deputy commissioner of the Commission ordered Key Risk to authorize further treatment by Dr. Hammond, and Plaintiff returned to her care. In 2010, after Key Risk argued that Plaintiff's benefits should be cut off for fraud and misrepresentation, a deputy commissioner entered an opinion and award requiring Key Risk to pay continued compensation for Plaintiff's care. On 29 April 2011, the Full Commission entered its own opinion and award in Plaintiff's favor (the "Opinion and Award"). Not only did the Full Commission award Plaintiff continued benefits, but it concluded as a matter of law that "[Key Risk and Southern Fiber] brought and defended this claim without reasonable grounds. . . . [Key Risk's and Southern Fiber's] position is not based upon reason." As a result, the Full Commission awarded Plaintiff attorney's fees, continued Key Risk's payment obligations in the amount of $345.35 per week "until further Order of the [Commission,]" and ordered that Plaintiff's daughter and family friend be reimbursed for their caregiving services, finding that Key Risk's refusal to pay prior to the entry of the Opinion and Award "was unreasonable and . . . constituted stubborn, unfounded litigiousness." Key Risk filed an untimely appeal of the Full Commission's decision to this Court, which was dismissed by order. Order, *Seguro-Suarez v. Southern Fiber*, COA12-238-1 (N.C. Ct. App. May 15, 2012). Key Risk next petitioned the North Carolina Supreme Court for writ of certiorari, but its petition was denied. *Seguro-Suarez v. Southern Fiber*, 366 N.C. 408, 735 S.E.2d 324 (2012).

Following its losses before the Commission, and after exhausting its appeal efforts, Key Risk, by and through its employees Individual Defendants, hired Carolina Investigative Services and Robert E. Hill (the "Investigator") to surreptitiously surveil and record Plaintiff for several weeks. Key Risk also arranged for an independent medical exam of Plaintiff on 10 June 2013 in order to determine whether his symptoms were legitimate and if Plaintiff actually required ongoing care.

The forensic psychiatrist who examined Plaintiff observed Plaintiff's "childlike" demeanor and concluded he was suffering from dementia, traumatic brain injury, chronic dizziness, and chronic headaches—all stemming from his workplace injury. Key Risk's chosen examiner further opined that Plaintiff's "symptoms appeared to be valid. There was no apparent malingering, in [her] opinion."

The mounting medical evidence and full-throated rebuke from the Commission left Key Risk undeterred in its efforts to undermine Plaintiff's medical diagnosis and continued care. After the independent medical exam, Key Risk directed its Investigator to convince the Lincolnton Police Department (the "LPD") to bring criminal charges against Plaintiff under the theory that he was obtaining his workers' compensation benefits by false pretenses, *i.e.*, by faking his diagnosed symptoms from his traumatic brain injury. The Investigator provided the LPD with an extensively edited videotape similar to that shown to Dr. Gaultieri in the proceeding before the Commission; as a result, the LPD arrested and jailed Plaintiff on 24 October 2013. On 10 March 2014, Plaintiff was indicted on 25 counts of obtaining property by false pretenses and one count of insurance fraud, all for accepting the checks ordered paid to him by the Commission.

After his first appearance in criminal court, Plaintiff was ordered to undergo a psychological examination at Central Regional Hospital in Butner, North Carolina to determine his competency to stand trial. The examining psychologist noted that Plaintiff "exhibited cognitive deficit consistent with his documented history, including memory impairment[,]" and concluded that Plaintiff was mentally incapable of both proceeding to trial and effectively assisting counsel. The State ultimately dismissed all charges against Plaintiff after a hearing in which the trial court asked the State if it "really want[ed] to assist in the establishment of a malicious prosecution claim[,]" and expressed "some real concerns when a man is drawing a check pursuant to an order, in effect, pursuant to a court order, and one side doesn't like the court order and decides to take out criminal charges because they disagree with what the ruling was."

After his release from custody, Plaintiff filed suit against Defendants and the Investigator in Mecklenburg County Superior Court, asserting causes of action for: (1) malicious prosecution; (2) abuse of process; (3) UDTP; (4) bad faith; (5) willful and wanton conduct; (6) civil conspiracy; and (7) punitive damages. Plaintiff's complaint asserts that Defendants undertook the above actions with the aim of terminating Plaintiff's workers' compensation benefits and relieving Key Risk of its financial burden. Defendants filed a motion to dismiss pursuant to Rules of Civil

Procedure 12(b)(1) and 12(b)(6), asserting that the trial court lacked subject matter jurisdiction and that the complaint failed to state a claim upon which relief could be granted. The trial court denied Defendants' motion by order entered 30 January 2017, and Defendants timely filed their notice of appeal on 13 February 2017.

II. ANALYSIS

A. Appellate Jurisdiction

The denial of a motion to dismiss brought pursuant to Rules 12(b)(1) and 12(b)(6) is an interlocutory order and typically not subject to immediate appellate review unless it affects a substantial right. *See*, *e.g.*, *Murray v. Univ. of N.C. at Chapel Hill*, 246 N.C. App. 86, 91-95, 782 S.E.2d 531, 535-37 (2016), *aff'd per curiam*, 369 N.C. 585, 792 S.E.2d 612 (2017) (reviewing case law concerning immediate appeals of motions to dismiss under Rules 12(b)(1) and 12(b)(6)). However, "our Supreme Court has determined that the denial of a motion to dismiss under Rule 12(b)(1) and the exclusivity provision of the [Workers' Compensation] Act affects a substantial right 'and will work injury if not corrected before final judgment . . . .' " *Estate of Vaughn v. Pike Elec., LLC*, 230 N.C. App. 485, 491, 751 S.E.2d 227, 231 (2013) (quoting *Burton v. Phx. Fabricators & Erectors, Inc.*, 362 N.C. 352, 661 S.E.2d 242 (2008)). Because Defendants' motion to dismiss expressly "contend[s] that th[e trial court] lacks subject matter jurisdiction . . . pursuant to the North Carolina Workers' Compensation Act" under Rule 12(b)(1), the denial of their motion on that ground affects a substantial right and is immediately appealable. *See Vaughn*, 230 N.C. App. at 491, 751 S.E.2d at 231.

As for the denial of Defendants' motion to dismiss pursuant to Rule 12(b)(6), Defendants request that we exercise our discretion to consider their appeal thereof "to expedite the administration of justice," as allowed in *Flaherty v. Hunt*, 82 N.C. App. 112, 113, 345 S.E.2d 426, 427 (1986). Plaintiff, for his part, asserts no argument against such an exercise. Because this Court already has jurisdiction over the denial of Defendants' motion pursuant to Rule 12(b)(1), and in the absence of any argument to the contrary, we exercise our discretion to hear Defendants' appeal of the denial of their motion to dismiss under Rule 12(b)(6). *Id.* at 113-14, 345 S.E.2d at 428.

B. Standards of Review

We consider the denial of a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction *de novo*, in which we "consider[ ] the matter anew and freely substitute[ ] [our] judgment for that of the

[trial court]." *Blow v. DSM Pharms., Inc.*, 197 N.C. App. 586, 588, 678 S.E.2d 245, 248 (2009) (internal quotation marks and citation omitted) (final alteration in original). In this review, we take as true all allegations in the complaint. *Good Hope Hosp., Inc. v. N.C. Dept. of Health and Human Svcs.*, 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (2005). But we also are permitted to consider matters outside the pleadings. *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007).

Similarly, we apply the *de novo* standard to review a trial court's ruling on a motion to dismiss pursuant to Rule 12(b)(6). *Green v. Kearney*, 203 N.C. App. 260, 265, 690 S.E.2d 755, 761 (2010). "The scope of our review is 'whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.' " *Holton v. Holton*, ___ N.C. App. ___, ___, 813 S.E.2d 649, 655 (2018) (quoting *State Emps. Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 264 N.C. 205, 210, 695 S.E.2d 91, 95 (2010)). "We consider the allegations in the complaint true, construe the complaint liberally, and only reverse the trial court's denial of a motion to dismiss if plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (citation omitted).

C. Subject Matter Jurisdiction

[1] Defendants argue that three prior decisions by this Court compel a conclusion that the Commission exercises exclusive jurisdiction over the tort claims alleged in Plaintiff's complaint. We reject this argument, because each of the prior decisions is inapposite to this matter. We address each in turn.

In *Johnson v. First Union Corp.*, 131 N.C. App. 142, 504 S.E.2d 808 (1998), we held that the Commission has exclusive jurisdiction "over workers compensation claims and all related matters . . . ." 131 N.C. App. at 143-44, 504 S.E.2d at 809. *Johnson* involved alleged tortious acts in the procedural course of workers' compensation proceedings that directly resulted in claims being denied by the Commission. *Id.* at 143, 504 S.E.2d at 809. The plaintiffs, two employees previously diagnosed with repetitive motion injuries, brought suit in superior court alleging that their employer and its insurance carrier presented a fraudulent videotape to their physician inaccurately portraying the physical requirements of their jobs, causing the physician to withdraw the diagnosis of work-related injury. *Id.* at 143, 504 S.E.2d at 809. One plaintiff also alleged that the employer fraudulently altered a workers' compensation form after she had signed it, further interfering with the proceeding. *Id.* at 143, 504

S.E.2d at 809. We held that the Commission had exclusive jurisdiction to address fraud in the settlement of a workers' compensation claim and affirmed the trial court's dismissal of the plaintiffs' civil claims because "the Workers' Compensation Act is a comprehensive regulatory scheme, and collateral attacks are inappropriate." *Id.* at 145, 504 S.E.2d at 810.

In *Deem v. Treadway & Sons Painting & Wallcovering, Inc.*, 142 N.C. App. 472, 477-78, 543 S.E.2d 209, 212-13 (2001), the plaintiff filed suit in superior court to set aside the settlement of his workers' compensation claim, alleging that it was predicated on fraudulent and unlawful acts committed by the defendants, including his employer and its insurer. We held that, because the Commission possessed express statutory authority to set aside a workers' compensation settlement for fraud, the "plaintiff's sole remedy in this case was to petition the Industrial Commission to set aside his agreement . . . ." *Id.* at 478, 543 S.E.2d at 212. We reasoned that the plaintiff's complaint was "nothing more than an allegation that defendants did not appropriately handle his workers' compensation claim, and thus he was injured because he did not receive his entitled benefit. This is the exact argument of the *Johnson* plaintiffs . . . ." *Id.* at 477, 543 S.E.2d at 212.

Bowden v. Young, 239 N.C. App. 287, 768 S.E.2d 622 (2015), like *Deem* and *Johnson*, involved alleged tortious acts conducted within the course of a workers' compensation proceeding in the Commission. The employee in *Bowden* brought suit in superior court for bad faith and intentional infliction of emotional distress, asserting that his employer's insurance carrier "communicated with his doctors without his permission[,] . . . wrongly sought a second opinion[,] . . . treated him belligerently over the phone, denied some of his requests for medical treatment via 'form letter,' improperly filed paperwork to suspend his compensation, and 'insisted that [the employee] needed to settle his Workers Compensation claim.' " 239 N.C. at 289, 768 S.E.2d at 624. In affirming the trial court's dismissal of the action, this Court explained that "[w]e distill from *Johnson* and *Deem* a straightforward rule: all claims arising from an employer's or insurer's processing and handling of a workers' compensation claim fall within the exclusive jurisdiction of the Industrial Commission, regardless of whether the alleged conduct was intentional or merely negligent." *Id.* at 291, 768 S.E.2d at 625.

We further recognized in *Bowden* that the " 'the Industrial Commission, charged with administration of the Workers' Compensation Act, is better suited than the Court to identify and regulate alleged abuses, if any, by insurance carriers and health care providers in matters under the

Workers' Compensation Act.' " *Id.* at 290, 768 S.E.2d at 624-25 (quoting *N.C. Chiropractic Ass'n, Inc. v. Aetna Cas. & Sur. Co.*, 89 N.C. App. 1, 9, 365 S.E.2d 312, 316 (1988)). Although we acknowledged that intentional torts "generally fall outside the scope of the Workers' Compensation Act," *id.* at 290, 768 S.E.2d at 625 (citing *Woodson v. Rowland*, 329 N.C. 330, 340-41, 407 S.E.2d 222, 228 (1991)), we affirmed the trial court's dismissal of the employee's complaint, because "*all* claims concerning the *processing* and *handling* of a workers' compensation claim are within the exclusive jurisdiction of the Industrial Commission, whether the alleged conduct is intentional or not." *Id.* at 290-91, 768 S.E.2d at 625 (citing *Johnson*, 131 N.C. App. at 143-44, 504 S.E.2d at 809; *Deem*, 142 N.C. App. at 477-78, 543 S.E.2d at 212) (emphasis in original).

To apply the "straightforward rule" recognized in *Johnson*, *Deem*, and *Bowden* to Plaintiff's action, as Defendants request, would stretch it beyond its factual and legal underpinnings. Plaintiff's complaint does not allege that he has been denied any workers' compensation benefits; to the contrary, he acknowledged at the final hearing in the criminal matter that Key Risk was still making the workers' compensation payments. Plaintiff's action, therefore, is markedly different from those brought in *Johnson* and *Deem*, which involved "allegation[s] that defendants did not appropriately handle his workers' compensation claim, and thus he was injured *because he did not receive his entitled benefit*." *Deem*, 142 N.C. App. at 477, 543 S.E.2d at 212 (emphasis added); *see also Johnson*, 131 N.C. App. at 143-44, 504 S.E.2d at 809. Plaintiff's case is further distinguishable from *Johnson*, *Deem*, and *Bowden* because, fundamentally, it does not concern the "*processing* and *handling* of a workers' compensation claim . . . ." *Bowden*, 239 N.C. App. at 290, 768 S.E.2d at 625 (citing *Johnson*, 131 N.C. App. at 143-44, 504 S.E.2d at 809 and *Deem*, 142 N.C. App. at 477-78, 543 S.E.2d at 212) (emphasis in original).

Plaintiff's tort claims, though tangentially associated with his ongoing workers' compensation payments, concern the initiation and continued pursuit of *a criminal prosecution*, not a workers' compensation claim. "General jurisdiction for the trial of criminal actions is vested in the superior court and the district court divisions of the General Court of Justice." N.C. Gen. Stat. § 7A-270 (2017). By contrast, "the North Carolina Industrial Commission is not a court of general jurisdiction; the Commission is a quasi-judicial administrative board created by the legislature to administer the Workers' Compensation Act and has no authority beyond that provided by statute." *Cornell v. W. and S. Life Ins. Co.*, 162 N.C. App. 106, 108, 590 S.E.2d 294, 296 (2004); *see also Barber v. Minges*, 223 N.C. 213, 217, 25 S.E.2d 837, 839 (1943) ("The

Industrial Commission is not a court of general jurisdiction. *It can have no implied jurisdiction beyond the presumption that it is clothed with power to perform the duties required of it by the law entrusted to it for administration*." (emphasis added)).

Law enforcement officers and prosecutors employed by the State and its subdivisions are not tasked with "processing and handling" workers' compensation claims, and neither are the district and superior court divisions of the General Court of Justice. Malicious use and abuse thereof, therefore, does not "aris[e] from . . . [the] processing and handling of a workers' compensation claim . . . within the exclusive jurisdiction of the Industrial Commission[.]" *Bowden*, 239 N.C. App. at 290, 768 S.E.2d at 625.

Although Plaintiff's complaint alleges that Defendants committed tortious acts in order to avoid liability to pay his workers' compensation, motivational concerns are irrelevant to our analysis. Taken to its logical end, this argument would allow a workers' compensation carrier to hire an assassin to kill an injured employee in order to terminate ongoing workers' compensation but avoid tort liability for wrongful death in civil court. Our Supreme Court has expressly held that:

> When an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in the case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, *and civil actions based thereon are not barred by the exclusivity provisions of the [Workers' Compensation] Act*.

Woodson, 329 N.C. at 340-41, 407 S.E.2d at 228 (emphasis added). Indeed, *Bowden* recognized that "intentional torts generally fall outside the scope of the Workers' Compensation Act" based on *Woodson*, 239 N.C. App. at 290, 768 S.E.2d at 625, and "distilled from *Johnson* and *Deem* a straightforward rule" that operates independently of any motivational considerations. That rule is limited to "all claims arising from an employer's or insurer's processing and handling of a workers' compensation claim . . . regardless of whether the alleged conduct was intentional or merely negligent." 239 N.C. App. at 291, 768 S.E.2d at 625.

Because the acts complained of in Plaintiff's complaint do not "aris[e] from an employer's or insurer's processing and handling of a workers' compensation claim[,]" *id.* at 91, 768 S.E.2d at 625, we reject

Defendants' argument that motivational considerations, rather than the factual and legal underpinnings of this case, would somehow bring this action within the exclusive jurisdiction of the Commission.[2] Plaintiff's claims do not fall within the scope of the Workers' Compensation Act, and, as a result, the trial court did not err in denying Defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).

D. Rule 12(b)(6)

In the alternative to their argument under Rule 12(b)(1), Defendants posit that Plaintiff's complaint entirely fails to state a claim upon which relief can be granted under Rule 12(b)(6). We therefore address each of Plaintiff's individual claims in turn.

1. Malicious Prosecution

[2] Plaintiff's first claim seeks redress for malicious prosecution. "To establish malicious prosecution, a plaintiff must show that the defendant (1) initiated or participated in the earlier proceeding, (2) did so maliciously, (3) without probable cause, and (4) the earlier proceeding ended in favor of the plaintiff." *Turner v. Thomas*, 369 N.C. 419, 425, 794 S.E.2d 439, 444 (2016) (citing *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc.*, 366 N.C. 505, 512, 742 S.E.2d 781, 786 (2013)). Defendants contend that Plaintiff has failed to allege the first "initiation" element of a malicious prosecution claim because, under their reading of *Farm Bureau*, "[p]arties cannot be liable for malicious prosecution where they provide information to law enforcement and prosecutors later decide to initiate criminal proceedings based on that information, even if the information provided was inaccurate or incomplete." Defendants' argument is unpersuasive.

In *Farm Bureau*, an investigator for the insurance company conducted an in-depth investigation of a house fire following a claim by an insured. 366 N.C. at 508-509, 742 S.E.2d at 784-85. The investigator

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2. Defendants contend that an allegation in Plaintiff's complaint that Defendants' tortious acts "relate[d] to the defense of the worker's compensation claim" necessitates a holding that Plaintiff's action "arise[s] from" said workers' compensation claim. As explained *supra*, this is not so—that Defendants' motivation was to terminate the obligation to pay Plaintiff compensation does not render the tortious acts themselves "arising from . . . [Key Risk's] processing and handling of [Plaintiff's] workers' compensation claim[,]" *Bowden*, 239 N.C. App. at 292, 768 S.E.2d at 625, where they in fact arise from the processing and handling of a criminal prosecution. This argument is analogous to the defense of a person charged with killing a homeowner in the course of a burglary, who argues that he cannot be prosecuted for murder because the death was only incidental to his motivation to steal.

discovered evidence suggesting that the house fire was not an accident but the result of arson on the part of the insured, and he provided this information to local law enforcement. *Id.* at 509-10, 742 S.E.2d at 785. Law enforcement arrested the insured but the district attorney later dismissed all criminal charges; the insured thereafter brought a malicious prosecution claim against the insurance company. *Id.* at 510, 742 S.E.2d at 785. Following a bench trial, the insurer was found liable for malicious prosecution, a ruling that was later affirmed by this Court on the basis that, but for the insurer's actions, the insured would not have been prosecuted. 220 N.C. App. 212, 725 S.E.2d 638 (2012). The Supreme Court, however, reversed our decision, holding that "the Court of Appeals' interpretation of the element of initiation in a malicious prosecution case does not account adequately for the roles played by police and prosecutorial discretion." 366 N.C. at 513, 742 S.E.2d at 787. Our Supreme Court instead adopted the following language from the Restatement (Second) of Torts:

> *Influencing a public prosecutor.* A private person who gives to a public official information of another's supposed criminal misconduct, of which the official is ignorant, obviously causes the institution of such subsequent proceedings as the official may begin on his own initiative, but giving the information or even making an accusation of criminal misconduct does not constitute a procurement of the proceedings initiated by the officer if it is left entirely to his discretion to initiate the proceedings or not. When a private person gives to a prosecuting officer information *that he believes to be true*, and the officer in exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rule stated in this Section even though the information proves to be false and his belief was one that a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.

Id. at 513, 742 S.E.2d at 787 (quoting Restatement (Second) of Torts § 653 cmt. g (1977) (emphasis added)). Though the Court noted the Restatement's formulation "allows citizens to make reports in good faith to police and prosecutors without fear of retaliation if the information proves to be incomplete or inaccurate[,]" it went on to note that "[i]f the

information is false, *this formulation only protects a party who believes it to be true. . . .*" *Id.* at 513-14, 742 S.E.2d at 787 (emphasis added). A party therefore "initiates" a malicious prosecution under *Farm Bureau* irrespective of independent prosecutorial discretion when it knowingly provides false information to authorities. *Id.* at 514, 742 S.E.2d at 787.

Here, Plaintiff's complaint alleges that Defendants "decided to falsely and maliciously accuse [Plaintiff] of committing insurance fraud and taking property by false pretenses," that they "caused criminal proceedings to be initiated against [him,]" and that they "acted with malice in providing false and misleading information to the [LPD] . . . ."[3] It further alleges that Defendants "intentionally and maliciously caused incomplete, false and misleading information [to] be given to the [LPD] . . . ." Employing a liberal construction of Plaintiff's complaint, we hold that these allegations are sufficient to survive Defendants' motion to dismiss pursuant to Rule 12(b)(6), and affirm the trial court's denial thereof on this claim.[4]

2. Abuse of Process

[3] Plaintiff's second claim for relief is for abuse of process. "Two elements must be proved to find abuse of process: (1) that the defendant had an ulterior motive to achieve a collateral purpose not within the normal scope of the process used, and (2) that the defendant committed some act that is a 'malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ.' " *Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 602, 646 S.E.2d 826, 831 (2007) (quoting *Stanback v. Stanback*, 297 N.C. 181, 200, 254 S.E.2d 611, 624 (1979)) (emphasis in original). Here, Defendants contend that Plaintiff has failed to allege facts satisfying the second element because "the Complaint does not allege that the Defendants took any actions after providing information to the LPD." Again, we disagree. The complaint alleges that after Plaintiff was charged and arrested, "Defendants caused criminal proceedings to be continued against [him], which led to him being indicted . . . ." It further alleges that, "[a]fter the warrants for arrest were issued, the defendants used the process

3. Although this allegation is made under a different cause of action, dismissal under Rule 12(b)(6) is not proper where "the allegations of the complaint . . . are sufficient to state a claim . . . under some legal theory, *whether properly labeled or not*." *Chapel H.O.M. Assocs., LLC v. RME Mgmt., LLC*, ___ N.C. App. ___, ___, 808 S.E.2d 576, 578 (2017) (emphasis added) (quoting *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003)).

4. Whether these allegations ultimately are supported by evidence is yet to be determined.

to attempt to recoup its [sic] funds . . . ." We hold these allegations are sufficient under our liberal pleading standards to set forth the second element of an abuse of process claim and affirm the trial court's denial of Defendants' motion on this ground.

3. Unfair and Deceptive Trade Practices

[4] Plaintiff's third cause of action asserts a UDTP claim against Key Risk based on Section 75-1.1 of the North Carolina General Statutes. Defendants argue that Plaintiff's claim is barred for lack of privity, relying on our holding in *Wilson v. Wilson*, 121 N.C. App. 662, 468 S.E.2d 495 (1996), that "North Carolina does not recognize a cause of action for third-party claimants against the insurance company of an adverse party based on unfair and deceptive trade practices under [N.C. Gen. Stat.] § 75-1.1." 121 N.C. App. at 665, 468 S.E.2d at 497. Plaintiff contends that, because Key Risk was already obligated to pay him his workers' compensation benefits at the time of its tortious conduct, *Wilson* should not bar his claim. Reviewing *Wilson* and subsequent case law, we agree with Plaintiff.

The same year that *Wilson* was decided, this Court held it was inapposite to a third party's UDTP claim against an insured driver's carrier. *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 15, 472 S.E.2d 358, 366 (1996). In *Murray*, we first acknowledged that "[o]ur case law establishes that 'if the third party is an intended beneficiary, the law implies privity of contract.' " We then held that "[t]he injured party in an automobile accident is an intended third-party beneficiary to the insurance contract between insurer and the tortfeasor/insured party[,]" and that "the instant [third-party] plaintiff is in contractual privity with [the driver's carrier], and for this reason alone, is not bound by the third-party restrictions set forth in *Wilson*." *Id.* at 15, 472 S.E.2d at 366. Nearly a decade later, we construed *Murray* to require a third-party plaintiff to first obtain a judgment before bringing a UDTP claim against the insurer. *Craven v. Demidovich*, 172 N.C. App. 340, 342, 615 S.E.2d 722, 724 (2005).

Most recently, this Court has summarized the rule of *Murray* and its progeny as follows: "In the automobile accident context, an injured party is recognized as a third-party beneficiary to the liability insurance policy, because, under the statute, '[t]he primary purpose of th[e] compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by financially irresponsible motorists.' " *USA Trouser, S.A. de C.V. v. Williams*, ___ N.C. App. ___, ___, 812 S.E.2d 373, 377 (2018) (quoting *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 440, 238 S.E.2d 597, 604 (1977)). This Court has further recognized the imposition of privity between third parties and insurers sufficient to

support a UDTP claim when similar statutory obligations exist for like purposes. *Nash Hosps., Inc. v. State Farm Mut. Auto. Ins. Co.*, ___ N.C. App. ___, ___, 803 S.E.2d 256, 263 (2017) (holding insurance company liable for payment practices violating the statutory subrogation rights of a claimant's medical providers), *disc. rev. denied*, ___ N.C. ___, 809 S.E.2d 869 (2018).

In *Nash Hospitals*, after providing medical treatment to a person injured in an automobile accident, Nash Hospitals sent notice of a medical lien to State Farm, the injuring party's insurer. *Id.* at ___, 803 S.E.2d at 259. The injured person, unrepresented by counsel, negotiated a settlement with the insurer, State Farm, who issued a joint check to the injured person, Nash Hospitals, and a third medical lienholder. *Id.* at ___, 803 S.E.2d at 258-59. Nash Hospitals informed State Farm that the issuance of a joint check violated Sections 44-49 and 44-50 of our General Statutes, which required insurers to pay valid medical liens prior to any settlement disbursement to a claimant. *Id.* at ___, 803 S.E.2d at 259. When State Farm refused to otherwise satisfy the medical lien, Nash Hospitals filed suit for UDTP against State Farm and ultimately obtained a favorable judgment on the merits. *Id.* at ___, 803 S.E.2d at 259. State Farm appealed the judgment, arguing that, based on *Wilson*, Nash Hospitals lacked privity to sue the insurer. *Id.* at ___, 803 S.E.2d at 262-63. We disagreed, holding that, because Sections 44-49 and 44-50 were enacted "to protect hospitals and other health care providers that provide medical services to injured persons[,]" they "expanded the scope of [third-party beneficiary] privity to hospitals and medical service providers." *Id.* at ___, 803 S.E.2d at 263. Because Nash Hospitals was in statutory privity with State Farm, and because the UDTP claim involved post-settlement conduct, we held *Wilson* inapposite and affirmed that portion of the trial court's judgment. *Id.* at ___, 803 S.E.2d at 263.

Like compulsory automobile insurance, "[t]he General Assembly has mandated that every employer subject to the Workers' Compensation Act maintain the ability to pay compensation benefits, either by purchasing workers' compensation insurance . . . or by self-insuring." *N.C. Ins. Guar. Ass'n v. Board of Trs. of Guilford Tech. Cmty. College*, 364 N.C. 102, 108-09, 691 S.E.2d 694, 698 (2010) (citing N.C. Gen. Stat. § 97-93 (2007)). And, just as "[t]he primary purpose of th[e] compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by financially irresponsible motorists[,]" *Chantos*, 293 N.C. at 440, 238 S.E.2d at 604, "[t]he [p]rimary consideration [of the Workers' Compensation Act] is compensation for injured employees. . . . 'The title and theory of the act import the idea of compensation for work[ers] and their dependents.' " *Roberts v. City Ice & Fuel Co.*, 210 N.C. 17, 21, 185

S.E. 438, 440-41 (1936) (quoting *Hodges v. Mortgage Co.*, 201 N.C. 701, 704, 161 S.E. 220, 222 (1931)).

Given the marked similarities between the compulsory automobile and workers' compensation insurance statutes, the reasoning in *Murray* that an "injured party in an automobile accident is an intended third-party beneficiary to the insurance contract between insurer and the tortfeasor/insured party," 123 N.C. App. at 15, 472 S.E.2d at 366, supports our holding that Plaintiff is an intended third-party beneficiary of Southern Fiber's insurance contract with Key Risk. Indeed, the Workers' Compensation Act itself provides that a workers' compensation insurance policy must "contain[] the agreement of the insurer that it will promptly pay to the person entitled to same all benefits conferred by this Article. . . . Such agreement shall be construed to be *a direct promise by the insurer to the person entitled to compensation enforceable in his name*." N.C. Gen. Stat. § 97-98 (2017) (emphasis added). Our Supreme Court has held that this provision creates an express benefit for, and enforceable by, the employee. *See Hartsell v. Thermoid Co., Southern Division*, 249 N.C. 527, 533, 107 S.E.2d 115, 119 (1959) ("Under the Act, plaintiff has a right to enforce the insurance contract *made for his benefit*." (citing N.C. Gen. Stat. § 97-98)). Because employees are, by statutory mandate, intended third-party beneficiaries of their employers' compulsory insurance policies, we hold that "the instant plaintiff is in contractual privity [with the insurer] . . . and for this reason alone, is not bound by the third-party restrictions set forth in *Wilson*." *Murray*, 123 N.C. App. at 15, 472 S.E.2d at 366.

Defendants urge this Court to reach a contrary result on the basis that they continue to litigate Plaintiff's compensation pursuant to N.C. Gen. Stat. § 97-18.1(c), so that the Opinion and Award requiring payment to Plaintiff is not akin to a civil judgment. Defendants further argue that allowing Plaintiff's UDTP claim to continue creates a potential conflict of interest for Key Risk with respect to its insured, Plaintiff's employer. *See Wilson*, 121 N.C. App. at 667, 468 S.E.2d at 498 ("[A]llowing a third-party claim against the insurer of an adverse party for violating [N.C. Gen. Stat.] § 58-63-15 may result in a conflict of interest for the insurance company."); *but see Murray*, 123 N.C. App. at 10, 472 S.E.2d at 363 (holding a third-party beneficiary of an automobile liability insurance contract could pursue a UDTP claim against the insured's carrier for violation of N.C. Gen. Stat. § 58-63-15). We reject these arguments.

Unlike the insurer in *Wilson*, Defendants have an ongoing legal obligation to pay Plaintiff as required by the Opinion and Award and Key Risk's own insurance policy with Southern Fiber. "[W]here the policy of

insurance is against liability . . . and the liability of the insured has been established by judgment, the injured person may maintain an action on the policy of insurance, *that is*, *coverage attaches when liability attaches* . . . ." *Hall v. Harleysville Mut. Cas. Co.*, 233 N.C. 339, 340, 64 S.E.2d 160, 161 (1951) (citations omitted) (emphasis added); *see also Craven*, 172 N.C. App. at 342, 615 S.E.2d at 124 (quoting *Lavender v. State Farm. Mut. Auto. Ins. Co.*, 117 N.C. App. 135, 136, 450 S.E.2d 34, 35 (1994), and *Hall* to explain the necessity of a civil judgment to bring a UDTP claim as a third-party beneficiary against an insurer under *Murray*). Key Risk's insurance policy with Southern Fiber states that the former will "pay promptly when due the benefits required of [Southern Fiber] by the workers compensation law." Key Risk's liability to Plaintiff therefore attached, at the latest,[5] upon entry of the Opinion and Award, as "a payment is due and payable when the Commission has entered an opinion awarding benefits to a claimant." *Smith v. Richardson Sports Ltd. I.C. Partners d/b/a Carolina Panthers*, 172 N.C. App. 200, 206, 616 S.E.2d 245, 250 (2005) (citation omitted).

Also, Section 97-18.1 includes no provision allowing or authorizing an employer's carrier to maliciously seek the arrest, incarceration, and felony prosecution of an employee for accepting workers' compensation payments awarded to him by the Commission, and no such action is permitted by Key Risk's insurance policy with Southern Fiber.

Wilson concerned a pre-trial UDTP complaint against both the insurer and the insured. 121 N.C. App. at 666, 468 S.E.2d at 498. By contrast, Plaintiff's complaint in the instant action was filed against Key Risk—and not Southern Fiber—five years after the Opinion and Award was entered and left undisturbed on appeal, all while Key Risk continued to pay the benefits ordered thereunder and as required by its insurance contract with Southern Fiber. This case is therefore more akin to the UDTP action in *Murray*, which we held stated a viable claim. 123 N.C. App. at 16, 472 S.E.2d at 366.

4. Bad Faith and Civil Conspiracy

[5] Although we affirm the portion of the trial court's order denying the dismissal of Plaintiff's malicious prosecution, abuse of process, and UDTP claims, we are persuaded by Defendants' challenges to Plaintiff's bad faith and civil conspiracy claims. We address each claim in turn.

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5. "By virtue of [N.C. Gen. Stat. § 97-98], once the employer has accepted an injury as compensable, benefits are 'due and payable[.]' " *Moretz v. Richards & Assocs., Inc.*, 316 N.C. 539, 541, 342 S.E.2d 844, 846 (1986). Here, the Opinion and Award includes a finding of fact that "Plaintiff sustained an admittedly compensable injury by accident . . . . Defendants accepted this claim . . . ."

A necessary element of a bad faith claim against an insurer is a refusal by the insurer to pay a valid claim. *Lovell v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 416, 420, 424 S.E.2d 181, 184 (1993). Plaintiff's complaint alleges no refusal to pay, and he acknowledges in his briefing that Key Risk "continued to pay his claim[.]" Though he argues that a bad faith claim "covers a wider variety of acts[ ] than simply failing to pay a legitimate claim," every case he cites concerns exactly that. *See, e.g.*, *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 116, 229 S.E.2d 297, 303 (1976) (noting that the tort exists to "deter refusals on the part of insurers to pay valid claims when the refusals are both unjustified and in bad faith"). Because Plaintiff has failed to plead a necessary element of this claim, we reverse this portion of the trial court's denial of Defendants' motion to dismiss.

[6] Like the bad faith claim, we also reverse the portion of the trial court's order denying dismissal of Plaintiff's civil conspiracy claim based on the intra-corporate immunity rule. The doctrine provides that, "because 'at least two persons must be present to form a conspiracy, a corporation cannot conspire with itself, just as an individual cannot conspire with himself.' " *Conleys Creek Ltd. P'ship. v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc.*, ___ N.C. App. ___, ___, 805 S.E.2d 147, 156 (2017) (quoting *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 184 N.C. App. 613, 625, 646 S.E.2d 790, 799 (2007), *rev'd on other grounds*, *State ex rel. Cooper*, 362 N.C. 431, 666 S.E.2d 107 (2008)). "[A]n allegation that a corporation is conspiring with its agents, officers or employees is tantamount to accusing a corporation of conspiring with itself[,]" *State ex rel. Cooper*, 184 N.C. App. at 625, 646 S.E.2d at 799, and is therefore insufficient to establish a claim for civil conspiracy. Here, Plaintiff asserts a civil conspiracy claim against Key Risk, several of its employees—all of whom were acting "in the course and scope of [their] employment" with Key Risk—and a private investigator hired by Key Risk. Nowhere in the complaint does Plaintiff allege that the various defendants conspired with anyone outside an employment or agent relationship with Key Risk. Nor does the complaint allege conduct outside of those employment or agency relationships.[6] Because Plaintiff's complaint fails to allege a conspiracy with anyone outside of Key Risk,

6. We note that some jurisdictions provide for exceptions to intra-corporate immunity where: (1) the employees or agents possess an independent motive from their employer or principal; or (2) the alleged conspiratorial acts were taken outside the scope of the employment or agency. *See, e.g.*, *Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 353 (4th Cir. 2013). We need not determine the applicability of these exceptions to the instant case, however, because Plaintiff's complaint is devoid of any allegations that would fall within them.

its employees, and its agents, it fails to state a claim for which relief can be granted, and we reverse the trial court's order as to this claim.

5. Punitive Damages

[7] Finally, Defendants argue that we should reverse the trial court's order as to Plaintiff's punitive damages claim because his complaint should have been dismissed in its entirety. As set forth *supra*, however, we hold that Plaintiff has stated tort claims for malicious prosecution, abuse of process, and UDTP sufficient to survive Defendants' motion to dismiss. His allegations of fraudulent, malicious, and willful and wanton conduct on the part of Defendants in perpetrating those acts are sufficient to allege punitive damages within the meaning of Section 1D-15 of our General Statutes. N.C. Gen. Stat. § 1D-15 (2017); *see also*, *e.g.*, *Horne v. Cumberland Cty Hosp. Sys., Inc.*, 228 N.C. App. 142, 150, 746 S.E.2d 13, 20 (2013) (affirming dismissal of a punitive damages claim where all substantive claims were also properly dismissed). We reject Defendants' argument.

III. CONCLUSION

Plaintiff's tort claims, although they pertain to a workers' compensation award, do not, as a matter of fact or law, "arise[ ] from an . . . insurer's processing and handling of a workers' compensation claim." Rather, Plaintiff's complaint arises out of a fraudulently and maliciously instituted criminal prosecution over which the Commission has no jurisdiction. Further, Plaintiff, as an injured employee who has obtained an award requiring payments to him under his employer's workers' compensation insurance policy is an intended third-party beneficiary of the policy in privity to bring a UDTP claim against the insurer. Plaintiff has sufficiently alleged claims for malicious prosecution, abuse of process, UDTP, and punitive damages; he has failed, however, to sufficiently allege claims for bad faith and civil conspiracy. For these reasons, we: (1) affirm the denial of Defendants' motion to dismiss all claims pursuant to Rule 12(b)(1); (2) affirm the denial of Defendants' motion pursuant to Rule 12(b)(6) as it pertains to Plaintiff's malicious prosecution, abuse of process, UDTP, and punitive damages claims; and (3) reverse the denial of Defendants' motion to dismiss pursuant to Rule 12(b)(6) as it pertains to Plaintiff's bad faith and civil conspiracy claims.

AFFIRMED IN PART; REVERSED IN PART.

Judges STROUD and DILLON concur.

STATE OF NORTH CAROLINA
v.
CHARLES WARD AYERS

No. COA17-725

Filed 4 September 2018

1. Firearms and Other Weapons—discharging a firearm into an occupied vehicle—self-defense—jury instruction

The trial court was required to instruct the jury on self-defense in a trial for discharging a firearm into an occupied and operating vehicle, because the evidence gave rise to a reasonable inference that defendant was acting in self-defense when he shot the tire of a truck that was persistently tailgating him and had veered into his lane, forcing him past the edge of the pavement. Self-defense instructions are available in prosecutions for general intent crimes where the evidence shows intentional conduct by the perpetrator to commit the act, even if there is no intention to cause harm.

2. Firearms and Other Weapons—discharging a firearm into an occupied vehicle—self-defense—jury instruction—no duty to retreat

In a prosecution for discharging a firearm into an occupied vehicle arising from a defendant shooting the tire of an adjacent vehicle to prevent being run off the road, defendant was entitled to a jury instruction on self-defense, including language that defendant had no duty to retreat from a place where he had a lawful right to be, where the evidence showed that the aggressor motorist was persistently tailgating defendant's vehicle on a public road, he paced defendant's vehicle rather than passing when given the opportunity, and veered into defendant's lane, forcing him past the edge of the pavement.

Appeal by defendant from judgment entered 14 December 2018 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 20 March 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary Carla Babb, for the State.

Vitrano Law Offices, by Sean P. Vitrano, for defendant-appellant.

TYSON, Judge.

Charles Ward Ayers ("Defendant") appeals from his convictions for discharging a firearm into an occupied and operating vehicle and misdemeanor injury to personal property. On appeal, he contends the trial court: (1) erred by omitting his requested no-duty-to-retreat instruction from a jury instruction on self-defense; (2) committed plain error by failing to instruct the jury on his right to use non-deadly force in self-defense; and, (3) erred by failing to intervene *ex mero motu* to strike statements made by the prosecutor during closing argument. We vacate Defendant's convictions and grant him a new trial.

I. Background

On 24 March 2015, Defendant was indicted by a grand jury for the offenses of discharging a firearm into an occupied and operating vehicle and injury to personal property. Defendant filed notice of his intent to offer evidence of self-defense at trial.

The evidence presented at trial tended to show that on the evening of 14 January 2015, Defendant, a U. S. Army veteran and disabled paratrooper, went to the Veterans Administration Hospital in Durham for treatment to address back pain. Defendant was there most of the day and was discharged from the hospital around 7 p.m. Defendant returned home by driving eastbound on Highway 98 between Durham and Wake Forest. Near an intersection with Olive Branch Road, a Chevrolet Silverado 1500 pickup truck pulled onto the roadway behind Defendant.

Defendant testified that the weather was cold and wet, as there had been a forecast of snow, but a persistent drizzle of rain fell instead. The roadway was dark as the sun had set and there were very few street lights.

> [I]t's an old style Carolina country road. You know, they didn't level out the hills and they didn't straighten out any of the curves, so it kind of meanders.
>
> There's not a lot of places to pass, but where they are, they're short, you know. It's not like you've got a half a mile worth of passing zone. Most of them, maybe if you have 300 yards for a pass, you're lucky.

Defendant testified that when the truck pulled behind him onto Highway 98, two or three cars were traveling in front of him. At times the line of cars would slow down from 45 mph to below 30 mph. Defendant

thought the drivers were cautious because of the weather, darkness and the potential for ice. When the cars in front of Defendant slowed down, Defendant slowed down, but the pickup truck behind him "would end up being pretty snug up on [his] rear bumper." Defendant testified, "At sometimes he was, you know, maybe 50 feet behind me, but at sometimes he was like less than 5 feet." Near the intersection of Highway 98 and Route 50, the only car still traveling in front of Defendant turned off.

The truck continued to follow Defendant for several miles, at times approaching within 5 feet of the rear of his vehicle. Before the intersection of Highway 98 and Route 50, the pickup truck tried to pass, but did not have enough room. After a second failed attempt, the truck began surging to within 10 to 15 inches of Defendant's back bumper. Defendant eventually reached a downhill, 4-mile stretch of road with no oncoming traffic and ample room for the truck to pass. Defendant testified, "He rode my bumper all the way down that hill and all the way across the causeway and the lake, past the recycling center, and he could have passed me at any moment during that almost three-miles worth of driving."

As they started going uphill, the truck pulled alongside Defendant as if to pass. Defendant braked, but the truck slowed too. "I realized he wasn't passing me. He was *pacing* me." (Emphasis supplied).

> [T]hen he stepped on the gas, but he also pulled the wheel over and started to come in towards me. . . . And he's basically, you know -- his rear tire -- if I'm sitting here and this is my driver's side door, I could have reached out and touched the rear tire of his truck. That's how close he was to me.
>
> . . . .
>
> I had reached down and I had grabbed the revolver out of the door pocket . . . . And I said, well, you know, if he forces me to a stop and he gets out of his vehicle, I'm going to make it clear to him before he approaches me that it's not the right thing to do.
>
> . . . .
>
> So I had the pistol against my hip. I had put the window down. Now he starts pushing me off the road, and I'm like, "Oh, God, I'm going to roll" because the wheel started to shake. . . .

> Q. Had you been pushed off the road at some point?
>
> A. My passenger side tires were in the mud. They were off the asphalt, at that point, and he was still pushing me further off. . . .
>
> . . . .
>
> And the car was really starting -- you know, the tires were digging into the mud on that side and my steering wheel was really starting to pull, and I knew that I was going to lose control of my car in the next second or two. I basically had no more time left to make a decision. I didn't want to hurt him. . . . I said, "Well you know what? I've got a tool in my hand. I don't have to hurt the guy. I can just disable the vehicle".
>
> So what I did was, again, the window was all the way down, and so I literally went and fired directly into the tire at a downward angle, but straight through the sidewall, okay.
>
> Q. How many times did you fire your --
>
> A. Just one.

Upon firing at the truck's tire, Defendant heard a pop and some hissing and saw the back of the truck "shimmy." Defendant came back onto the roadway and stopped his vehicle. The pickup truck came to a safe stop in the middle of the roadway 40 to 60 feet ahead of Defendant. Defendant left the scene and went directly home.

The truck driver was Timothy Parker, a registered nurse, who was going home after work. Parker testified that while he was behind Defendant's vehicle on Highway 98, Defendant would slow down in the no passing zones and then accelerate to prevent Parker from passing him in the safe passing zones. When he did pull alongside Defendant to pass, Parker heard a pop and saw his vehicle's tire pressure warning light come on. "I put it together pretty quickly [that Defendant had shot my tire]." Parker pulled his vehicle over in the median, and made note of Defendant's license plate number as the other vehicle passed.

When law enforcement officers arrived at Defendant's home, he surrendered his firearm and told two Granville County deputies and Wake County Sheriff's Office Investigator Ashley Bledsoe what had happened.

Defendant was indicted for discharging a firearm into an occupied and operating vehicle and misdemeanor injury to personal property on 24 March 2015. The case was tried before a jury beginning on 13 December 2016.

During the charge conference, the trial court stated it intended to give North Carolina Pattern Jury Instruction 308.45 on self-defense "without language about duty or lack of duty to retreat." Defense counsel objected and requested the trial court to give an instruction that Defendant "has no duty to retreat in a place where the [D]efendant has a lawful right to be." N.C.P.I. Crim. 308.45 (2016). The trial court declined to give the requested no-duty-to-retreat instruction.

Following the presentation of the evidence, the jury found Defendant guilty of discharging a firearm into an occupied and operating vehicle and injury to personal property. The trial court entered a consolidated judgment in accordance with the jury's verdicts and sentenced Defendant to an active term of 51 to 74 months, then suspended the sentence and placed Defendant on supervised probation for a period of 36 months. Defendant appeals.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2017).

III. No Duty to Retreat

A. Trial Court's Obligation to Instruct

[1] Defendant contends the trial court was obligated to give his requested jury instruction that he had no duty to retreat from where he had a lawful right to be when confronted with deadly force. "It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988) (citation omitted).

A self-defense instruction is mandated when evidence is presented from which a jury could reasonably infer the defendant acted in self-defense. *State v. Allred*, 129 N.C. App. 232, 235, 498 S.E.2d 204, 206 (1998) (citation omitted). "In determining whether an instruction on . . . self-defense must be given, the evidence is to be viewed in the light most favorable to the defendant." *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010) (citation omitted). N.C. Gen. Stat. § 14-51.3(a) states, in relevant part:

> A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, *a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be* if . . . the following applies:
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.

N.C. Gen. Stat. § 14-51.3(a) (2017) (emphasis supplied).

Self-defense is an affirmative defense, and "[a]n affirmative defense is one in which the defendant says, 'I did the act charged in the indictment, but I should not be found guilty of the crime charged because * * *.' " *State v. Caddell*, 287 N.C. 266, 289, 215 S.E.2d 348, 363 (1975). Defendant clearly gave the State prior notice of his intent to affirmatively assert self-defense.

Defendant was charged with discharging a firearm into an occupied and operating vehicle and injury to personal property. Both of these offenses are general intent crimes. *See* N.C. Gen. Stat. § 14-160(a) (2017); *State v. Jones*, 339 N.C. 114, 148, 451 S.E.2d 826, 844 (1994) ("Discharging a firearm into a vehicle does not require that the State prove any specific intent but only that the defendant perform[ed] the act which is forbidden by statute. It is a general intent crime." (citation omitted)).

By analogy, second-degree murder is also a general intent crime to which a defendant may be entitled to a self-defense instruction, even though the defendant did not intend to assault a victim with the intent to kill, but only the general intent to strike the blow. *See State v. Richardson*, 341 N.C. 585, 594-95, 461 S.E.2d 724, 730-31 (1995).

The defendant in *Richardson* was convicted of second-degree murder. *Id.* On appeal, the defendant claimed that the jury instruction on self-defense was misleading, since it suggested self-defense was only available if the jury determined the defendant had intended to kill, even though there was no such specific intent requirement to convict the defendant of second-degree murder. *Id.* Our Supreme Court stated that the instruction for self-defense did not mean that the defendant must have had the specific intent to kill the victim to be entitled to assert self-defense, but only that he had the intent to strike the victim with the blow which caused the death:

> Contrary to the Court of Appeals' decision, the language in the self-defense instruction does not read into the defense an "intent to kill" that is not an element of second-degree murder. A killing in self-defense involves an admitted, intentional act, as does second-degree murder. However, simply because defendant admitted intentionally committing an act resulting in death does not mean that defendant has admitted forming a specific "intent to kill."
>
> . . . .
>
> The jury was thus instructed that second-degree murder involved an "intentional killing," but it was also specifically instructed that an intentional killing did not refer to the "presence of a specific intent to kill." The jury was instructed that defendant would be excused of committing second-degree murder if he "reasonably believed it was necessary to kill the victim in order to save himself from death or great bodily harm." There is no reason to suppose that the jury read the self-defense language to include as an element that defendant formed a "specific intent to kill" the victims. . . . Reviewing the instructions given to the jury, we conclude that the jury would not have interpreted the self-defense instruction to include a specific intent to kill, an element not necessary for a conviction of second-degree murder.

Id.

Our Supreme Court recently reaffirmed this principle in *State v. Lee*, in which it held a self-defense instruction was available for a defendant charged with second-degree murder, which does not require a specific intent to kill. 370 N.C. 671, 811 S.E.2d 563 (2018).

Although the Supreme Court has held a self-defense instruction is not available where the defendant claims the victim's death was an "accident," each of these cases involves facts where the defendant had testified he did not intend to strike the blow. For example, a self-defense instruction is not available where a defendant states he killed the victim because his gun accidentally discharged. *State v. Blankenship*, 320 N.C. 152, 154-55, 357 S.E.2d 357, 358-59 (1987). A self-defense instruction is not available when a defendant claims he was only firing a warning shot that was not intended to strike the victim. *State v. Cook*, ___ N.C. App. ___, ___, 802 S.E.2d 575, 577 (2017), *aff'd*, 370 N.C. 506, 809 S.E.2d 566 (2018). These line of cases are factually distinguishable from the

present case and are not controlling, because it is undisputed Defendant intended to "strike the blow" and shoot Parker's tire, even if he did not intend to kill Parker.

This Court held a self-defense instruction was warranted in *State v. Evans*¸ where the defendant was charged with discharging a firearm into an occupied vehicle. 19 N.C. App. 731, 734, 200 S.E.2d 213, 214 (1973). In *Evans*, the defendant's evidence tended to show:

> [the victim] had given defendant $45.00 for which defendant was going to secure an eight-track tape player and some tape cartridges. Defendant had spent the $45.00 on drugs and had not delivered the tape player. Defendant was told that [the victim] was looking for him and had a pistol. Defendant saw [the victim] parked across the street from defendant's house with a pistol on the seat beside him. Defendant saw [the victim] return to the scene with either a shotgun or rifle. Defendant was afraid of [the victim] and fired a rifle at [the victim's] vehicle to make him leave.

Id. at 733-34, 200 S.E.2d at 214.

The trial court had denied the defendant's request for a self-defense instruction. *Id.* at 733, 200 S.E.2d at 214. Although the defendant had not intended to kill the victim when he fired upon his truck, this Court held the defendant was entitled to a self-defense instruction and remanded for a new trial. *Id.* at 734, 200 S.E.2d at 214.

The pattern jury instruction for discharging a firearm into an occupied vehicle in operation specifies the language "without justification or excuse" should be given, "where there is evidence of justification or excuse, such as self-defense." N.C.P.I. Crim. 208.90D, fn. 2 (2017). Similarly, the pattern jury instruction for injury to personal property includes the language "defendant did this willfully and wantonly; that is, intentionally and *without justification or excuse*[.]" N.C.P.I. Crim. 223.15 (2017) (emphasis supplied).

As with the general intent crime of second-degree murder, these precedents and authorities show a self-defense instruction is available for both of the offenses Defendant was charged with, because he intended to shoot into Parker's tire, even if he did not intend to kill Parker. *See Richardson*, 341 N.C. at 594-95, 461 S.E.2d at 730-31. Following *Evans* and *Richardson*, Defendant was not required to show he "intended to kill" Parker to warrant a self-defense instruction being given to the jury.

Defendant needed only to have shown the intent to "strike the blow" and shoot at Parker's vehicle.

B. Stand Your Ground

[2] Defendant was entitled to a self-defense instruction with no-duty-to-retreat language included. Viewed in the light most favorable to Defendant, the evidence shows Defendant was driving at night in wet conditions with a potential for ice, along a meandering two-lane public highway with few street lights. According to Defendant, Parker came up behind him and persistently tailgated Defendant's vehicle with bright lights, while other traffic was traveling in front of him. Parker had an opportunity to pass Defendant, instead Parker pulled up alongside him. Defendant slowed down, Parker also slowed and "paced" him, rather than passing, and veered closer towards Defendant's vehicle.

According to Defendant, Parker moved his vehicle into Defendant's lane and was driving so close to his vehicle, Defendant could have reached out from his driver's side window and touched Parker's rear-passenger tire. Defendant's vehicle's passenger-side tires were both off the paved portion of the road on the muddy shoulder. Defendant stated he was afraid he would lose control, his vehicle would flip upside down, and he would be paralyzed.

Whether Defendant's use of force under these circumstances was reasonable or excessive is clearly a question of fact to be determined by the jury upon proper instructions. *State v. Benge*, 272 N.C. 261, 264, 158 S.E.2d 70, 72 (1967) ("[T]he question of excessive force is to be determined by the jury." (citation omitted)).

Defendant was present in a location he lawfully had a right to be: driving inside his vehicle upon a public highway. Defendant was under no legal obligation to stop, pull off the road, veer from his lane of travel, or to engage his brakes and risk endangering himself. *See* N.C. Gen. Stat. § 14-51.3(a).

Without the jury being instructed that Defendant had no duty to retreat from a place where he lawfully had a right to be, the jury could have determined, as the prosecutor argued in closing, that Defendant was under a legal obligation to cower and retreat. This notion would have required Defendant to have (1) further slowed down while being "paced," (2) pulled off the road, or (3) ceased maintaining his lawful course of travel to avoid Parker's use of his truck as a deadly weapon to force him off the road, in order to avoid criminal liability. *See State v. Jackson*, 74 N.C. App. 92, 95, 327 S.E.2d 270, 272 (1985) ("[A] motor

vehicle may be a deadly weapon if used in a dangerous and reckless manner." (citation omitted)).

Viewed in the light most favorable to Defendant, there is a "reasonable possibility that, had the trial court given the required stand-your-ground instruction [to the jury], a different result would have been reached at trial." *Lee*, 370 N.C. at 676, 811 S.E.2d at 567. Defendant is entitled to a new trial with proper jury instructions on self-defense.

IV. Conclusion

Self-preservation is the most basic and fundamental natural right any individual possesses. The ability of an individual to protect and defend himself against force, and particularly deadly force, and to maintain one's life and very existence against assertions of deadly force is essential to preserving life. *See State v. Holland*, 193 N.C. 713, 718 138 S.E. 8, 10 (1927) ("The first law of nature is that of self-defense. The law of this State and elsewhere recognizes this primary impulse and inherent right.").

The trial court erred in failing to instruct the jury that Defendant had no duty to retreat. Defendant was entitled to a self-defense instruction, including language that Defendant had no duty to retreat or could defend and stand his ground where he was in a location where he had a "lawful right to be." N.C. Gen. Stat. § 14-51.3(a). Defendant has shown a reasonable possibility the jury could have returned a different verdict had the trial court given the requested and statutorily mandated self-defense and no-duty-to-retreat instruction to the jury. *See id*.

In light of our award of a new trial, the remaining issues are moot and it is not necessary to address them. We reverse Defendant's convictions and remand for a new trial with proper instructions. *It is so ordered.*

NEW TRIAL.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA,
v.
DEVON SHAMARK CROOMS, DEFENDANT
v.
AGENT ASSOCIATES INSURANCE, LLC, SURETY

No. COA17-640

Filed 4 September 2018

Bail and Pretrial Release—bond forfeiture—relief from final judgment—statutory requirements—statement of reasons and supporting evidence

The trial court erred in granting a surety relief from a bond forfeiture after a criminal defendant removed his ankle monitoring device and absconded during trial where the surety's motion was deficient under N.C.G.S. § 15A-544.8 because it failed to set forth evidence of extraordinary circumstances that would justify relief.

Appeal by Wilson County Board of Education from order entered 23 February 2017 by Judge Milton F. Fitch, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 16 November 2017.

No brief filed for the State, Defendant, or Surety.

Schwartz & Shaw, P.L.L.C., by Kristopher L. Caudle and Rebecca M. Williams, for Wilson County Board of Education, respondent-appellant.

BERGER, Judge.

The Wilson County Board of Education ("the Board") appeals the February 23, 2017 order, which granted a petition for the remission of a bond forfeiture filed by Agent Associates Insurance, LLC (the "Surety") through its bond agent Roland M. Loftin, Jr. ("Loftin"). The Board argues that the petition for remission did not provide statutorily required evidence to support the Surety's motion, and in partially granting the relief sought by the Surety, the trial court erred. We agree, and reverse the order of the trial court.

Factual and Procedural Background

In November 2015, Devon Shamark Crooms ("Defendant") was on trial for being an accessory before the fact to murder. Prior to his

trial, Defendant had been placed on pretrial release[1] through the Wilson County Sheriff's Department. As a condition of his release, Defendant was equipped with an electronic-monitoring device worn on his ankle. An individual with the Wilson County Sheriff's Department monitored the device and would receive an alert if it was tampered with or removed.

Defendant was present in court for his trial when the State presented its case in chief. After all evidence had been presented to the jury, and immediately following the charge conference, Defendant left the courtroom during the lunch recess on November 19, 2015. While out of the courtroom, Defendant removed his electronic-monitoring ankle bracelet and absconded. After Defendant failed to return for the remainder of the trial, it was completed in his absence. An order for Defendant's arrest was entered on the day he had absconded, and Defendant was eventually arrested near Miami, Florida.

As an additional condition for Defendant's pretrial release, bail had been set at $50,000.00. To cover bail, Defendant paid $1,400.00 of the $3,000.00 premium to have a $50,000.00 appearance bond issued by Loftin as bail agent for the Surety. Because Defendant had absconded from trial, the Wilson County Clerk of Court issued a Bond Forfeiture Notice on November 23, 2015.

Loftin testified at the hearing on his petition for remission of the bond forfeiture that after Defendant fled, Loftin went to great lengths to return Defendant into custody. Loftin testified that he had spent approximately $80,000.00 and traveled as far as New Jersey in an attempt to find Defendant and return him to custody. Loftin filed a motion to set aside the bond forfeiture on March 7, 2016. On May 19, 2016, the motion was denied, and a final judgment of forfeiture of the $50,000.00 bond was entered by the trial court and satisfied by the Surety.

On December 20, 2016, the Surety filed its Petition for Remission from Final Judgment of Forfeiture contending that there were extraordinary circumstances that would justify relief from the bond forfeiture. On February 23, 2017, the trial court found that extraordinary circumstances existed, and noted the following during the hearing on the petition:

> In this particular case I see nothing that the bail agent did wrong up until the defendant had left court. He brought

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1. Counsel for the Board failed to include in the record a standard AOC-CR-200 form describing the conditions of pretrial release for Defendant. There may have been other relevant conditions of pretrial release, and those stated herein are based on our review of the record and the transcript of the hearing.

> him to court every time he was scheduled to be in court. And even on this particular occasion he brought him to court and the man left after trial was in progress and the matter was ready to go to the jury.
>
> Now a bail agent doesn't sit with a defendant seven days a week, 24 hours a day and does not have the ability to move that person in and out.
>
> And in this particular case this individual was on a pretrial monitor and he walked away from the pretrial monitor as well as the bail agent. . . . [C]ertainly the sheriff would have gotten the first warning to be the first responder. Is not there equal, based on release, liability on the sheriff as also on the bail agent?
>
> . . .
>
> And in this particular case, because of the severity [of the offense], the agent never could have signed the bond if the person were not hooked up to a monitor. So then in that particular case, is there equal liability on the sheriff as well as the bail agent?
>
> . . .
>
> I mean isn't that the real reason that we even have pretrial monitors? If not, if not, then all you got to do is just do away with the bail agents. Maybe that's the way we're going. Just hook everybody up to a monitor. And then if they run, then who does the School Board sue then?
>
> . . .
>
> [Factors to] consider are the diligence of the surety of staying abreast of the defendant's whereabouts prior to the date of appearance. Because he brought him here. He got him here. He came. Not one day. He came two days. And then three days. And then in the middle of the trial something happened and he didn't come back. They were in trial.

The trial court then ordered the Board to remit $7,500.00 to the Surety.

The Board timely appeals, arguing that Surety's motion for relief did not comply with the requirements of N.C. Gen. Stat. § 15A-544.8, and

thus, the trial court erred in granting Surety's motion for relief. We agree and reverse.

Analysis

The requirements for seeking and allowing relief from a final judgment of forfeiture are set forth by statute, and "[t]here is no relief from a final judgment of forfeiture except as provided in this section." N.C. Gen. Stat. § 15A-544.8(a) (2017). A court may grant relief from a final judgment of forfeiture only when "extraordinary circumstances exist that the court, in its discretion, determines should entitle that person to relief," or when notice was not properly given to the person seeking relief. N.C. Gen. Stat. § 15A-544.8(b).

For a party to obtain relief from a final judgment of forfeiture, Section 15A-544.8(c) sets forth the following procedure:

> (1) At any time before the expiration of three years after the date on which a judgment of forfeiture became final, any of the following parties named in the judgment may make a written motion for relief under this section:
>
> a. The defendant.
>
> b. Any surety.
>
> c. A professional bondsman or a runner acting on behalf of a professional bondsman.
>
> d. A bail agent acting on behalf of an insurance company.
>
> *The written motion shall state the reasons for the motion and set forth the evidence in support of each reason.*
>
> (2) The motion shall be filed in the office of the clerk of superior court of the county in which the final judgment was, entered. The moving party shall, under G.S. 1A-1, Rule 5, serve a copy of the motion on the district attorney for that county and on the attorney for the county board of education.
>
> (3) A hearing on the motion shall be scheduled within a reasonable time in the trial division in which the defendant was bonded to appear.

> (4) At the hearing the court may grant the party any relief from the judgment that the court considers appropriate, including the refund of all or a part of any money paid to satisfy the judgment.

N.C. Gen. Stat. § 15A-544.8(c) (emphasis added). In construing this Section, this Court's duty is "to carry out the intent of the legislature. As a cardinal principle of statutory interpretation, if the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *State v. Dunn*, 200 N.C. App. 606, 608-09, 685 S.E.2d 526, 528 (2009) (*purgandum*[2]).

Based upon the plain language of the statute, the motion for relief from the judgment of forfeiture was required to "state the reasons for the motion and set forth the evidence in support of each reason." N.C. Gen. Stat. § 15A-544.8(c)(1). The motion filed by the Surety seeking relief from the forfeiture merely alleged that "there were extraordinary circumstances . . . that would justify a relief under N.C. Gen. Stat. § 15A-544.8 from the bond forfeiture, said circumstances to be presented via affidavit and/or testimony at the hearing on this Motion." Beyond stating "extraordinary circumstances" as the reason for the motion, the Surety failed to comply with the statutory requirement to set forth evidence. Because of the deficiencies of the Surety's motion, the trial court had no grounds on which to grant the motion, and it should have been summarily denied. Therefore, this failure of the Surety to comply with the plain language of the statue compels us to reverse the order of the trial court.

REVERSED.

Judges HUNTER and INMAN concur.

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2. Our shortening of the Latin phrase "*Lex purgandum est.*" This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use purgandum to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

STATE v. DEGRAPHENREED

[261 N.C. App. 235 (2018)]

STATE OF NORTH CAROLINA
v.
DEMARKO DONIVAN DEGRAPHENREED

No. COA17-1377

Filed 4 September 2018

1. Search and Seizure—curtilage—reaso\nable expectation of privacy—location of car—on public street and outside of home's fence

The trial court erred in its order denying defendant's motion to suppress contraband found in his vehicle by concluding that the vehicle was parked in the curtilage of defendant's home. The vehicle was parked on the side of a public street opposite the home and outside of the fence that surrounded the home—not in a place where defendant had a reasonable expectation of privacy.

2. Appeal and Error—preservation of issues—waiver—argument raised for first time on appeal

Defendant's argument concerning a police K-9's reliability was waived where he raised it for the first time on appeal.

3. Search and Seizure—warrantless searches—totality of the circumstances—vehicle

Police officers had probable cause to conduct a warrantless search of the trunk of defendant's vehicle, which was parked on a public street, where a confidential reliable informant had made controlled purchases from defendant near the vehicle, defendant was in possession of the vehicle's keys when officers executed a search warrant of his home, and a police K-9 alerted for narcotics next to the vehicle.

Appeal by defendant from judgment entered 21 March 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 9 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John A. Payne, for the State.

Allegra Collins for defendant-appellant.

TYSON, Judge.

Demarko Donivan Degraphenreed ("Defendant") appeals the trial court's denial of his motion to suppress evidence seized from a search of a vehicle. We affirm.

I. Background

Between January and March 2015, Winston-Salem police officers conducted a drug investigation of Defendant, including surveillance of Defendant's residence located at 301 South Spring Street Unit-A, which is situated at the end of a dead-end street. During January 2015, a confidential police informant arranged over the telephone to meet with Defendant for the purpose of purchasing heroin. The confidential informant and Defendant purportedly agreed to meet at Defendant's residence. Law enforcement officers provided the confidential informant with an unspecified amount of money to conduct a controlled purchase and observed the confidential informant enter Defendant's residence. Afterwards, the confidential informant surrendered a quantity of heroin to the law enforcement officers, which the informant indicated he had purchased from Defendant.

A couple of months later, in March 2015, the same confidential informant conducted another controlled purchase of heroin at Defendant's residence on behalf of law enforcement. The informant obtained a quantity of heroin, which he advised the law enforcement officers he had purchased from Defendant. During the course of the three month surveillance of Defendant's residence, law enforcement officers observed the confidential informant purchase narcotics from Defendant at the trunk of a vehicle parked on the other side of the road from Defendant's residence. The vehicle was a black 1985 Mercury Grand Marquis (the "Grand Marquis"). Law enforcement officers had observed the vehicle being regularly parked across from Defendant's residence during the course of the three-month investigation.

Based upon the information obtained from the confidential informant, Winston-Salem Police Investigator Ashley Kimel applied for and was issued a search warrant for Defendant's residence at 301 South Spring Street Unit-A on 13 March 2015. Neither Officer Kimel's search warrant application nor the search warrant referenced the Grand Marquis vehicle.

Later on 13 March 2015, Officer Kimel, Officer Patrick McKaughan, and other law enforcement officers executed the search warrant for Defendant's residence. Upon arriving at Defendant's residence, Officer Kimel observed the Grand Marquis parked "adjacent from the residence, across the street." Officer Kimel observed that two of the tires

of the Grand Marquis were partially on the road way and the vehicle was parked parallel to Defendant's residence. There was no other residence on the side of the street the Grand Marquis was parked upon, but a parking lot and a commercial building is located there. Surrounding Defendant's residence was a seven-to-eight-foot-high chain link fence around the sides and back of Defendant's yard and a short wooden fence in the front of the residence.

When the officers executed the search warrant, Officer McKaughan entered Defendant's residence while Officer Kimel crossed the street and approached the Grand Marquis. Officer Kimel requested Officer McKaughan bring his police K-9, named Sassy, outside to sniff the Grand Marquis. Officer McKaughan had Sassy sniff the outside of the Grand Marquis, and the K-9 gave a positive alert for narcotics. Officer Kimel then went inside Defendant's residence to obtain the keys to the Grand Marquis. Another officer inside the residence, Detective Luper, informed Officer Kimel that Defendant had requested a key ring be placed inside his pocket. Officer Kimel retrieved the key ring from Defendant's pocket and found one of the keys located on the key ring unlocked the Grand Marquis.

Upon searching the Grand Marquis, the officers discovered inside the trunk a backpack containing Defendant's wallet, which contained Defendant's social security card and bank cards. Inside the backpack, officers also found a Smith & Wesson .38 caliber revolver, a Raven Arms .25 caliber handgun, a Taurus Millennium PT111 Pro 9mm handgun, two orange prescription pill bottles, one of which contained a plastic bag containing a substance that tested positive for heroin.

The backpack also contained a box of Browning .25 caliber auto ammunition, a digital scale, and a plastic bag containing MDMA and 30 tablets of oxycodone. After searching the VIN number of the Grand Marquis, Officer Kimel discovered the vehicle was registered to Defendant's girlfriend. The officers then arrested Defendant.

On 6 July 2015, Defendant was indicted for trafficking opium or heroin by possession, possession with intent to sell and deliver heroin, possession with intent to sell and deliver oxycodone, possession of a firearm by a felon, possession of marijuana, and possession of drug paraphernalia. On 27 January 2016, Defendant filed a motion to suppress the evidence seized from the search of the Grand Marquis. In his motion to suppress, Defendant asserted the evidence obtained from the Grand Marquis should be suppressed because no probable cause existed to search the vehicle and the search warrant for Defendant's residence did

not refer to a vehicle. Following a hearing on Defendant's motion to suppress, the trial court orally denied Defendant's motion on 21 March 2016.

The trial court filed a written order (the "Order") denying Defendant's motion to suppress on 23 March 2017. Based upon its findings of fact, the trial court concluded "there was probable cause to search the trunk of the 1985 Grand Marquis."

On 21 March 2017, Defendant pled guilty to all charges, while expressly reserving the right to appeal the denial of his motion to suppress. Defendant was sentenced for trafficking opium or heroin by possession from 70 to 93 months imprisonment and ordered to pay a $50,000 fine. On the charges for possession with intent to sell and deliver heroin, possession with intent to sell and deliver oxycodone, possession of a firearm by a felon, possession of marijuana, and possession of drug paraphernalia, Defendant was sentenced to 10 to 21 months imprisonment, to run concurrently with his sentence for trafficking opium or heroin by possession. Defendant filed timely notice of appeal.

II. Jurisdiction

Jurisdiction lies with this Court pursuant to N.C Gen. Stat. §§ 15A-1444(e) (2017) and 15A-979(b) (2017).

III. Issues

Defendant asserts the trial court erred by denying his motion to suppress. He argues the police officers searched the Grand Marquis vehicle without a search warrant and without probable cause, in violation of the Fourth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment. U.S. Const. amend. XIV, § 1; *State v. Sanders*, 327 N.C. 319, 331, 395 S.E.2d 412, 420 (1990), *cert. denied*, 498 U.S. 1051, 112 L. Ed. 2d 782 (1991) ("The fourth amendment as applied to the states through the fourteenth amendment protects citizens from unlawful searches and seizures committed by the government or its agents." (citation omitted)).

Defendant argues, "the trial court's finding that the car was parked within the curtilage of Defendant's residence was unsupported by the evidence, and erroneous as a matter of law" and "the findings of fact which were supported by competent evidence did not support its conclusion of law that probable cause supported the search of the vehicle." Defendant also asserts, for the first time on appeal, the State failed to produce sufficient evidence of the K-9's reliability.

IV. Standard of Review

The scope of this Court's review of a trial court's order denying a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Bone*, 354 N.C. 1, 7, 550 S.E.2d 482, 486 (2001) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)), *cert. denied*, 535 U.S. 940, 152 L.Ed.2d 231 (2002). The trial court's conclusions of law are reviewed *de novo*. *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993) (citation omitted).

"In reviewing the denial of a motion to suppress, we examine the evidence introduced at trial in the light most favorable to the State . . . ." *State v. Hunter*, 208 N.C. App. 506, 509, 703 S.E.2d 776, 779 (2010) (citation omitted).

V. Analysis

A. Curtilage

[1] Regarding curtilage, the trial court concluded, in pertinent part:

> 16. The street in front of the residence is narrow and a dead end. The vehicle was routinely parked across the street, *in effect becoming part of the curtilage of the premises*, despite the house being surrounded by a fence. (Emphasis supplied).
>
> 17. Officer Kimel had probable cause to search the trunk of the Grand Marquis (*curtilage or not*) after the dog alerted. (Emphasis supplied).

Although the trial court labeled this determination as a finding of fact, the issue of whether an area is located within the curtilage of a home is a question of law. *See United States v. Dunn*, 480 U.S. 294, 301, 94 L.Ed.2d 326, 334-335 (1987) (establishing a four-factor legal test to determine the boundaries of a home's curtilage). The labels "findings of fact" and "conclusions of law" employed by the lower court in a written order do not determine the nature of our standard of appellate review. *See Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011) (reviewing what was labeled as a "conclusion of law" as a finding of fact). If the lower tribunal labels as a finding of fact what is in substance a conclusion of law, we review that "finding" as a conclusion *de novo*. *Id.*

"The United States Supreme Court has . . . defined the curtilage of a private house as 'a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept.' " *State v. Washington*, 134 N.C. App. 479, 483, 518 S.E.2d 14, 16 (1999) (quoting *Dow Chemical Co. v. United States*, 476 U.S. 227, 235, 90 L.Ed.2d 226, 235 (1986)).

"As a general rule, 'if a search warrant validly describes the premises to be searched, a car [also located] on the premises may be searched even though the warrant contains no description of the car.' " *State v. Courtright*, 60 N.C. App. 247, 249, 298 S.E.2d 740, 742, *appeal dismissed and review denied*, 308 N.C. 192, 302 S.E.2d 245 (1983) (quoting *State v. Reid*, 286 N.C. 323, 326, 210 S.E.2d 422, 424 (1974)). "The premises of a dwelling house include, for search and seizure purposes, the area within the curtilage . . . ." *Id.* at 249, 298 S.E.2d at 742.

The State conceded at oral argument before this Court that the Grand Marquis was not located within the curtilage of Defendant's residence. Nothing indicates Defendant had a reasonable expectation of privacy in the side of a public street opposite to his residence and outside of the confines of the fence surrounding the residence. The trial court's conclusion of law, incorrectly labeled as a finding of fact, is erroneous as a matter of law that the Grand Marquis was "in effect" within the curtilage of Defendant's residence when it was parked upon a public street.

Although the Grand Marquis was located and parked outside of the curtilage of the residence, this conclusion does not automatically warrant a reversal of the trial court's order. The remainder of the trial court's unchallenged findings of fact support its conclusion the police had probable cause to conduct the search of the Grand Marquis based upon: (1) the information relayed to police by the confidential informant; (2) police observation of the confidential informant and Defendant at the Grand Marquis; (3) Defendant having the keys to the Grand Marquis on his person when the search warrant was executed; (4) the K-9 sniff; and, (5) the motor vehicle exception to the Fourth Amendment.

B. Warrantless Searches

Here, the search warrant did not mention the Grand Marquis. "A warrantless search is lawful if probable cause exists to search and the exigencies of the situation make search without a warrant necessary." *State v. Mills*, 104 N.C. App. 724, 730, 411 S.E.2d 193, 196 (1991) (citing *State v. Allison*, 298 N.C. 135, 141, 257 S.E.2d 417, 421 (1979)).

"Probable cause exists where the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *State v. Downing*, 169 N.C. App. 790, 795, 613 S.E.2d 35, 39 (2005) (quotation and internal quotation marks omitted). "The existence of probable cause is a 'commonsense, practical question' that should be answered using a 'totality-of-the-circumstances approach.' " *State v. McKinney*, 361 N.C. 53, 62, 637 S.E.2d 868, 874 (2006) (citing *Illinois v. Gates*, 462 U.S. 213, 230-31, 76 L. Ed. 2d 527, 543-44 (1983); *State v. Arrington*, 311 N.C. 633, 637, 319 S.E.2d 254, 257 (1984)).

"The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *United States v. Ross*, 456 U.S. 798, 825, 72 L. Ed. 2d 572, 594 (1982) (quotation marks and citation omitted).

An exception to the warrant requirement is the motor vehicle exception. *See id.*; *State v. Isleib*, 319 N.C. 634, 638-39, 356 S.E.2d 573, 576-77 (1987) (detailing the automobile exception to the Fourth Amendment's warrant requirement).

"A warrant is not required to perform a lawful search of a vehicle on a public road when there is probable cause for the search." *State v. Baublitz*, 172 N.C. App. 801, 808, 616 S.E.2d 615, 620 (2005) (citation omitted). Under the motor vehicle exception, "A police officer in the exercise of his duties may search an automobile without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile carries contraband materials." *State v. Holmes*, 109 N.C. App. 615, 621, 428 S.E.2d 277, 280 (quotation marks, citation, and ellipses omitted), *disc. rev. denied*, 334 N.C. 166, 432 S.E.2d 367 (1993). "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Ross*, 456 U.S. at 825, 72 L. Ed. 2d at 594.

Concerning a confidential informant, this Court has previously held:

> Information from a [confidential reliable informant] can form the probable cause to justify a search. *State v. Holmes*, 142 N.C. App. 614, 544 S.E.2d 18, *cert. denied*,

> 353 N.C. 731, 551 S.E.2d 116 (2001). "In utilizing an informant's tip, probable cause is determined using a 'totality-of-the circumstances' analysis which 'permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip.' " *Holmes*, 142 N.C. App. 614, 621, 544 S.E.2d 18, 22 (2001) (quoting *State v. Earhart*, 134 N.C. App. 130, 133, 516 S.E.2d 883, 886 (1999)).

State v. Nixon, 160 N.C. App. 31, 37, 584 S.E.2d 820, 824 (2003).

The trial court's order contains several findings of fact, which are based upon competent evidence in the record to which Defendant does not assign error, including:

> 2. A confidential and reliable informant (CI) had advised the police that a black male known as "Red" (later determined to be Defendant Demarko Degraphenreed) was selling and distributing heroin from 301 S. Spring Street.
>
> 3. The CI made monitored, controlled buys of heroin at that residence from Defendant Degraphenreed prior to issuance of the search warrant (January-March, 2015).
>
> . . .
>
> 5. During each surveillance, the [Grand Marquis] was backed [into] its parked location, so officers could not view the license plate and ascertain registration/ownership.
>
> 6. The CI told officers that Defendant Degraphenreed utilized the vehicle.
>
> 7. During one of the CI's purchases, officers observed Defendant Degraphenreed at the trunk of the [Grand Marquis].
>
> . . .
>
> 12. The keys to the vehicle were on a key ring that was in a bedroom door. Defendant Degraphenreed asked officers in the house to put "his" keys in his pocket. Officer Kimel retrieved the keys to the vehicle from Defendant's pocket.

Defendant does not assign error to these findings. These unchallenged findings are binding upon appeal. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) ("[W]hen . . . the trial court's findings of

fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." (citation omitted)).

In addition, the search warrant for Defendant's residence also expressly authorized the search of Defendant's person. At the hearing on Defendant's motion to suppress, Officer Kimel testified:

> [Officer Kimel]: Detective Luper was standing by with Mr. Degraphenreed in Bedroom NO. 2, which was the child's bedroom and requested the keys from Mr. Degraphenreed, which initially he advised the car did not belong to him. Detective Luper informed me that there were keys that were initially located in the doorknob to this bedroom, and that Mr. Degraphenreed had requested to have his keys, referring to these keys that were in that door be placed in his pocket. Detective Luper advised that he placed the keys in his pocket. And that is where I retrieved the keys from Mr. Degraphenreed and found that one of the keys that were on the key-ring belonged to that vehicle.

Defendant did not object to this testimony at the hearing and Defendant does not challenge the trial court's finding of fact 12, which summarizes this testimony.

C. K-9's Reliability

[2] Beyond the trial court's "finding" that the Grand Marquis was within the curtilage, Defendant argues on appeal the reliability of the K-9 was not sufficiently established by the State to support the trial court's conclusion the officers had probable cause to search the Grand Marquis, pursuant to *Florida v. Harris*, 568 U.S. 237, 240, 185 L. Ed. 2d 61 (2013). However, Defendant is raising the issue of the K-9's reliability for the first time on appeal.

In Defendant's written motion to suppress, the affidavit in support of his motion to suppress, and at the hearing on Defendant's motion to suppress, Defendant only asserted and argued the search warrant not mentioning the Grand Marquis and the Grand Marquis being outside the curtilage of his residence as the reasons the officers did not have probable cause to search the Grand Marquis. At the hearing on the motion to suppress, the trial court and Defendant's trial counsel had the following exchange:

> THE COURT: I'll hear from you in just a minute, [Prosecutor].

> But [Defense Counsel], I wanted to give you an opportunity, if you wanted to comment. You know, I read the State v. Lowe during the break. I also read and was rereading Florida v. Harris, which is [a] United States Supreme court 9-0 opinion in 2013, that basically established that evidence of a dog's satisfactory performance in certification or training is sufficient reason to trust his alert. And then his alert is enough for probable cause.
>
> So it really seems, that an argument can be made that despite the curtilage of the house, or what the search warrant covered, once the dog went out and sniffed the vehicle and alerted, then they had probable cause to search the vehicle. *But particularly, coupled with the knowledge that the vehicle had been present, that the CI had told them the Defendant had been by the trunk of the car*. But the alert of the dog kind of gave them probable cause to go in, it seems to me. But I don't know if you've read that case recently. (Emphasis supplied).
>
> [Defense Counsel]: I'm not familiar with that case Judge but –
>
> THE COURT: It's 568 U.S. I'm not sure of the number, but it was decided February 19th 2013.
>
> [Defense Counsel]: But Judge, even from the dog sniff, if in fact that *only further strengthened* their probable cause at that point in time for a vehicle where they know that it is not his. They're bound to go get a search warrant in that situation to see if even more reason for them to go get a search warrant of that vehicle, compounded with the other factors in the case. They decided not to do that. And no exception applies, Judge, under this fact scenario. *I agree, dog sniff does allow for probable cause*. (Emphasis supplied).

Our appellate courts have repeatedly held a party may not assert a different theory on appeal, which was not raised before the trial court. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) ("This Court has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.' ") (citing *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)); *see also State*

v. Benson, 323 N.C. 318, 321-22, 372 S.E.2d 517, 518-19 (1988) (holding defendant waived argument where defendant relied on one theory before trial as basis for written motion to suppress and then asserted another theory on appeal).

Defendant did not assert the K-9's purported lack of reliability as a basis for his motion to suppress before the trial court, and his trial counsel conceded a dog's sniff provides a basis for probable cause. Defendant's argument against the K-9's reliability is being raised for the first time on appeal and is waived. *See Sharpe*, 344 N.C. at 194, 473 S.E.2d at 5.

With regards to the K-9's open-air sniff, the trial court made the following relevant finding of fact:

> 11. Sassy performed a free air sniff of the Grand Marquis, gave a positive alert for narcotics and a further alert at the trunk of the vehicle.

Defendant does not contest the K-9 never alerted to the scent of narcotics or otherwise assign error to finding of fact 11. This Court has previously acknowledged that an open-air dog sniff does not constitute a search under the Fourth Amendment:

> The United States Supreme Court discussed the Fourth Amendment implications of a canine sniff in *United States v. Place*, 462 U.S. 696, 77 L. Ed. 2d 110 (1983). There, the Court treated the sniff of a well-trained narcotics dog as sui generis because the sniff disclose[d] only the presence or absence of narcotics, a contraband item. *Id.* at 707, 77 L. Ed. 2d at 121. As the United States Supreme Court explained in *Illinois v. Caballes*, since there is no legitimate interest in possessing contraband, a police officer's use of a well-trained narcotics dog that reveals only the possession of narcotics does not compromise any legitimate privacy interest and does not violate the Fourth Amendment. 543 U.S. 405, 408-09, 160 L. Ed. 2d 842, 847 (2005).

State v. Washburn, 201 N.C. App. 93, 97, 685 S.E.2d 555, 558 (2009) (internal quotation marks omitted and alteration in original). The open-air sniff by the K-9, Sassy, at Officer McKaughan's direction did not constitute a "search" under the Fourth Amendment. *See id.*

The K-9's positive alert for narcotics at the Grand Marquis provided Officer Kimel with additional factors to find probable cause to conduct

a warrantless search of the inside of the vehicle. "[A] positive alert for drugs by a specially trained drug dog gives probable cause to search the area or item where the dog alerts." *Id.* at 100, 685 S.E.2d at 560. The K-9's positive alert for narcotics within the Grand Marquis was "sufficient to support a reasonable belief that the automobile carrie[d] contraband materials." *Holmes*, 109 N.C. App. at 621, 428 S.E.2d at 280.

D. Probable Cause

[3] Based upon the totality of the circumstances, Officer Kimel had probable cause to search the trunk of the Grand Marquis. The trial court's findings of fact reflecting: (1) the controlled purchases by the confidential reliable informant, during which times the Grand Marquis was always present; (2) the officers' observation of a drug transaction taking place at the trunk of the Grand Marquis; (3) the Grand Marquis parked on a public street near Defendant's residence during the officers' investigation; (4) the Defendant's possession of the keys to the Grand Marquis; and (5) the K-9's positive alerts outside of the vehicle for the potential presence of narcotics, provide a reasonable, common-sense basis to support probable cause for the officers to believe narcotics were present inside the Grand Marquis. *See Nixon*, 160 N.C. App. at 37, 584 S.E.2d at 824 ("Information from a [confidential reliable informant] can form the probable cause to justify a search." (citation omitted)); *Washburn*, 201 N.C. App. at 100, 685 S.E.2d at 560 ("a positive alert for drugs by a specially trained drug dog gives probable cause to search the area or item where the dog alerts").

Based upon the automobile being located on a public road exception to the Fourth Amendment warrant requirement, probable cause justified the officers in conducting the warrantless search of the Grand Marquis. *See Baublitz*, 172 N.C. App. at 808, 616 S.E.2d at 620 ("A warrant is not required to perform a lawful search of a vehicle on a public road when there is probable cause for the search." (citation omitted)).

Arguably, the officers had probable cause to search the Grand Marquis even without the K-9 sniff, based upon the controlled purchases by the confidential informant, the officers' observation of Defendant and the confidential informant at the trunk of the Grand Marquis during a controlled purchase. *Nixon*, 160 N.C. App. at 37, 584 S.E.2d at 824. The K-9's positive alerts for narcotics further supports the conclusion the officers had probable cause to search the Grand Marquis.

The trial court's unchallenged findings of fact support the trial court's conclusion Officer Kimel had probable cause to conduct a

warrantless search of the trunk of the Grand Marquis. Defendant's arguments are overruled.

VI. Conclusion

The trial court misapprehended the law in concluding the Grand Marquis was parked within the curtilage of Defendant's residence. Defendant has waived the issue of the K-9's reliability by not raising the issue before the trial court. The trial court's remaining findings of fact support the trial court's conclusion Officer Kimel had probable cause to search the Grand Marquis, under the totality of the circumstances. The trial court's order denying Defendant's motion to suppress is affirmed. *It is so ordered.*

AFFIRMED.

Judges DIETZ and BERGER concur.

STATE OF NORTH CAROLINA
v.
AARON LEE GORDON, DEFENDANT

No. COA17-1077

Filed 4 September 2018

Satellite-Based Monitoring—enrollment upon release from prison—constitutionality as applied

A trial court order enrolling defendant in satellite-based monitoring (SBM) upon his release from prison was unconstitutional as applied where his sentence consisted of 190 to 288 months in prison and lifetime sex-offender registration. Enrollment of an individual in North Carolina's SBM program constitutes a search for purposes of the Fourth Amendment and the State did not establish the circumstances necessary for the trial court to determine the reasonableness of a search fifteen to twenty years before its execution.

Judge DIETZ concurring.

Appeal by defendant from order entered 13 February 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 22 March 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.

ZACHARY, Judge.

The trial court ordered Defendant Aaron Lee Gordon to enroll in lifetime satellite-based monitoring following his eventual release from prison. Defendant appeals. Because the State cannot establish at this time that Defendant's submission to satellite-based monitoring will constitute a reasonable Fourth Amendment search in the future, upon Defendant's release from prison, we vacate the trial court's civil order mandating satellite-based monitoring.

Background

I. Satellite-Based Monitoring

Our General Assembly has described the legislative purpose of sex-offender registration programs as follows:

> . . . the General Assembly recognizes that law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders who commit sex offenses or certain offenses against minors are impaired by the lack of information available to law enforcement agencies about convicted offenders who live within the agency's jurisdiction. . . .
>
> Therefore, it is the purpose of this Article to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article.

N.C. Gen. Stat. § 14-208.5 (2017).

In furtherance of these objectives, the General Assembly enacted "a sex offender monitoring program that uses a continuous satellite-based

monitoring system . . . designed to monitor" the locations of individuals who have been convicted of certain sex offenses. N.C. Gen. Stat. § 14-208.40(a) (2017). The present satellite-based monitoring program provides "[t]ime-correlated and continuous tracking of the geographic location of the subject using a global positioning system based on satellite and other location tracking technology." N.C. Gen. Stat. § 14-208.40(c)(1) (2017). The reporting frequency of a subject's location "may range from once a day (passive) to near real-time (active)." N.C. Gen. Stat. § 14-208.40(c)(2) (2017).

After determining that an individual falls within one of the three categories of offenders to whom the program applies, *see* N.C. Gen. Stat. § 14-208.40(a)(1)-(3), the trial court must conduct a hearing in order to determine the constitutionality of ordering the targeted individual to enroll in the satellite-based monitoring program. *Grady v. North Carolina*, 575 U.S. ___, ___, 191 L. Ed. 2d 459, 462 (2015) ("*Grady I*"); *State v. Blue*, ___ N.C. App. ___, ___, 783 S.E.2d 524, 527 (2016). The trial court may order a qualified individual to enroll in the satellite-based monitoring program during the initial sentencing phase pursuant to N.C. Gen. Stat. § 14-208.40A (2017), or at a later time during a "bring-back" hearing pursuant to § 14-208.40B (2017). For an individual ordered to enroll in the satellite-based monitoring program at the sentencing hearing, the monitoring begins after service of the individual's active sentence.

II. Defendant's Enrollment

In February 2017, Defendant pleaded guilty to statutory rape, second-degree rape, taking indecent liberties with a child, assault by strangulation, and first-degree kidnapping. Defendant was sentenced to 190 to 288 months' imprisonment and lifetime sex-offender registration. The trial court also ordered, pursuant to N.C. Gen. Stat. § 14-208.40(a)(1) and § 14-208.6(1a), that Defendant enroll in the satellite-based monitoring program for the remainder of his natural life upon his release from prison.

The State's only witness at Defendant's satellite-based monitoring hearing was Donald Lambert, a probation and parole officer in the sex-offender unit. Lambert explained that the satellite-based monitoring device currently in use is "just basically like having a cell phone on your leg." The device requires two hours of charging each day, which must occur while the device remains attached to Defendant's leg. The charging cord is approximately eight to ten feet long. Defendant must also allow an officer to enter his home in order to inspect the device every 90 days.

Lambert testified that under the current satellite-based monitoring program, the device is "monitoring where you're going at all times[.]" Once Defendant is released from prison, "we [will] monitor [him] weekly. . . . [W]e just basically check the system to see his movement to see where he is, where he is going weekly. . . . [W]e review all the particular places daily where he's been." "[T]he report that can be generated from that tracking[] gives that movement on a minute-by-minute position," as well as "the speed of movement at the time[.]" Under the current statutory regime, this information can be accessed at any time; no warrant is required. The monitoring system will also "immediately" alert the authorities if Defendant enters a restricted area, such as driving past a school zone. In the event that this were to happen, Lambert testified that "What we normally do is we contact [the enrollee] by phone immediately after they get the alert, ask where they are."

Lambert was asked what Defendant would have to do if "he had a traveling sales job that covered, for instance, a regional area of Virginia, North Carolina and South Carolina?" Lambert explained that the sheriff's office "would have to approve it." Defendant would also "have to clear that with [the Raleigh office] as well. And then he would have to notify the state that he's going to if he was going to—and have to decide whether or not he'd have to stay on satellite-based monitoring in another state."

The State introduced Defendant's Static-99 score at his satellite-based monitoring hearing. Lambert explained that Static-99 is "an assessment tool that they've been doing for years on male defendants over 18. It's just a way to assess whether or not they'll commit a crime again of this [sexual] sort." Lambert testified that defendants are assigned "points" based on

> whether or not they've committed a violent crime, whether or not there was an unrelated victim, whether or not there was—there's male victims. . . . Other than just the sexual violence, was there another particular part of violence in the crime—in the index crime? Also, [it] does take their prior sentencing dates into factor too.

Defendant received a "moderate/low" score on his Static-99, which Lambert explained meant there was "a moderate to low [risk] that he would ever commit a crime like this again." Defendant did not have any convictions for prior sex offenses, but he was given a point for having previous violent convictions. Based on Defendant's Static-99 assessment, Lambert agreed that "it's not likely he's going to do that [commit

a sex offense] again[.]" Other than Defendant's Static-99 score, neither Lambert nor the State were able to offer "any evidence . . . as to what the rate of recidivism is during—even during [a] five-year period[.]"

The purpose of the satellite-based monitoring program is "to monitor subject offenders and correlate their movements to reported crime incidents." N.C. Gen. Stat. § 14-208.40(d) (2017). However, Lambert also noted that the satellite-based monitoring program could potentially be of benefit to Defendant. As Lambert explained, "if somebody takes charges out, it will show where they are. So it kind of—it can help them as well, showing that they've been to particular places. If somebody says he was over here doing this at a particular time, it will—it will show, hey, no, he was over here."

After reviewing the evidence presented during the hearing, the trial court recited the following:

> Let the record reflect we've had this hearing, and the Court is going to find by the preponderance of the evidence that the factors that the State has set forth—his previous assaults, the Static-99 history, the fact that this occurred in an apartment with other children present as well and the relatively minor physical intrusion on the defendant to wear the device—it's small. It has to be charged two hours a day. But other than that, it can be used in water and other daily activities—so I am going to find . . . that he should enroll in satellite-based monitoring for his natural life unless terminated.

Defendant filed proper notice of appeal from the trial court's satellite-based monitoring order. On appeal, Defendant only challenges the constitutionality of the satellite-based monitoring order as applied to him. He argues that the trial court erred in ordering that he be subjected to lifetime satellite-based monitoring because "[t]he state failed to meet its burden of proving that imposing [satellite-based monitoring] on [Defendant] is reasonable under the Fourth Amendment." We agree.

Standard of Review

A trial court's determination that satellite-based monitoring is a reasonable search under the Fourth Amendment is reviewed *de novo*. *State v. Martin*, 223 N.C. App. 507, 508, 735 S.E.2d 238, 238 (2012) (citing *State v. Bare*, 197 N.C. App. 461, 464, 677 S.E.2d 518, 522 (2009), *disc. review denied*, 364 N.C. 436, 702 S.E.2d 492 (2010)). "Under a *de novo* review, the court considers the matter anew and freely substitutes

its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citations and quotation marks omitted).

Discussion

I.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. A "search" will be found to have occurred so as to trigger Fourth Amendment protections where the government "physically occupie[s] private property for the purpose of obtaining information[,]" *United States v. Jones*, 565 U.S. 400, 404, 181 L. Ed. 2d 911, 918 (2012), or where government officers are shown to have "violate[d] a person's 'reasonable expectation of privacy[.]' " *Id.* at 406, 181 L. Ed. 2d at 919 (quoting *Katz v. United States*, 389 U.S. 347, 360, 19 L. Ed. 2d 576, 587 (1967)) (other citations omitted).

In *Grady I*, the United States Supreme Court held that enrollment of an individual in North Carolina's satellite-based monitoring program constitutes a search for purposes of the Fourth Amendment. *Grady*, 575 U.S. at ___, 191 L. Ed. 2d at 461-62. In so concluding, the Supreme Court explained:

> In *United States v. Jones*, we held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.' " We stressed the importance of the fact that the Government had "physically occupied private property for the purpose of obtaining information." Under such circumstances, it was not necessary to inquire about the target's expectation of privacy in his vehicle's movements in order to determine if a Fourth Amendment search had occurred. "Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred."

> We reaffirmed this principle in *Florida v. Jardines*, [569 U.S. 1, 185 L. Ed. 2d 495] (2013)[.] . . . In light of these decisions, it follows that a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements.

Id. at ___, 191 L. Ed. 2d at 461-62 (quoting *Jones*, 565 U.S. at 404, 406 n.3, 181 L. Ed. 2d at 918, 919 n.3).

Nevertheless, the Supreme Court in *Grady I* made clear that its determination that the defendant had been subjected to a search was only the first step in the overall Fourth Amendment inquiry, noting that "[t]he Fourth Amendment prohibits only *unreasonable* searches." *Id.* at ___, 191 L. Ed. 2d at 462. The Supreme Court explained that whether an individual's enrollment in the satellite-based monitoring program constitutes a reasonable Fourth Amendment search will "depend[] on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* (citing *Samson v. California*, 547 U.S. 843, 165 L. Ed. 2d 250 (2006) and *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 132 L. Ed. 2d 564 (1995)). However, as our courts had not yet conducted that inquiry, the Supreme Court declined to "do so in the first instance." *Id.* The Supreme Court concluded only that the satellite-based monitoring program constituted a search, leaving it to our courts to determine the "ultimate question of the program's constitutionality." *Id.*

On remand from *Grady I*, this Court held that the defendant's enrollment in the satellite-based monitoring program was not a reasonable Fourth Amendment search.[1] *State v. Grady*, ___ N.C. App. ___, ___ S.E.2d ___, 2018 N.C. App. LEXIS 460 ("*Grady II*"). We noted that, notwithstanding the defendant's appreciably diminished expectation of privacy by virtue of his status as a convicted sex-offender, satellite-based monitoring was highly intrusive and unlike any other search the United States Supreme Court had upheld thus far. Despite the fact that satellite-based monitoring was "uniquely intrusive," *id.* at *15, "the State failed to present any evidence of its need to monitor [the] defendant, or the procedures actually used to conduct such monitoring[.]" *Id.* at *21-22. Accordingly, we concluded that the State had failed to meet its burden of proving that satellite-based monitoring would constitute a reasonable

1. This Court reached a similar conclusion more recently in *State v. Griffin*, ___ N.C. App. ___, ___ S.E.2d ___, 2018 N.C. App. LEXIS 792.

Fourth Amendment search under the totality of the circumstances. This was particularly so in light of the fact that "law enforcement is not required to obtain a warrant in order to access [the] defendant's . . . location data." *Id.* at *17. Indeed, it has long been "determined that 'where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant.' " *Riley v. California*, ___ U.S. ___, ___, 189 L. Ed. 2d 430, 439 (2014) (quoting *Vernonia Sch. Dist. 47J*, 515 U.S. at 653, 132 L. Ed. 2d at 574).

II.

In the instant case, pursuant to the satellite-based monitoring statutes, the State submitted an application for the general authority to collect and access Defendant's location information on a continuing basis. Defendant's location information would be accessed in order to determine whether Defendant has traveled to a restricted area and, more broadly, to "correlate [his] movements to reported crime incidents." N.C. Gen. Stat. § 14-208.40(c)(2), (d) (2017). This is in accordance with the underlying purpose of the satellite-based monitoring program, which is quite plainly "to discover evidence of criminal wrongdoing[.]" *Vernonia Sch. Dist. 47J*, 515 U.S. at 653, 132 L. Ed. 2d at 574.

The State filed its satellite-based monitoring application at the time of Defendant's sentencing, pursuant to N.C. Gen. Stat. § 14-208.40A. Because of Defendant's active sentence, the trial court's order granting the State's application will allow the State the authority to search Defendant—*i.e.*, to "physically occup[y] private property for the purpose of obtaining information"—beginning in 2032.[2] *Jones*, 565 U.S. at 404, 181 L. Ed. 2d at 918. Thus, in the instant case, Defendant has yet to be searched.

Nevertheless, solely by virtue of his status as a convicted sex-offender, the trial court's order has vested in the State the authority to access the sum of Defendant's private life once he is released from prison. *Grady II*, 2018 LEXIS 460, at *15-16 (quoting *Jones*, 565 U.S. at 415, 181 L. Ed. 2d at 925 (Sotomayor, J., concurring)) (" 'GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about [his] familial, political, professional,

2. The trial court sentenced Defendant to 190 to 288 months' imprisonment. Defendant was given credit for 426 days spent in confinement prior to the date judgment was entered against him in February 2017.

religious, and sexual associations.' [T]hrough analysis of [satellite-based monitoring] location data, the State could ascertain whether an offender was regularly visiting a doctor's office, an ABC store, or a place of worship."). Lambert testified that pursuant to the satellite-based monitoring order, his office will "monitor [Defendant] weekly. . . . [W]e just basically check the system to see his movement to see where he is, where he is going weekly. . . . [W]e review all the particular places daily where he's been." Neither the State's application nor the trial court's order place limitations on the State's ability to access this information. The trial court's order resembles, in essence, a general warrant.

A "general warrant" has traditionally been described as one "that gives a law-enforcement officer broad authority to search and seize unspecified places or persons; a . . . warrant that lacks a sufficiently particularized description of the . . . place to be searched." *General Warrant*, Black's Law Dictionary (8th ed. 2014). General warrants also include those that are not "supported by showings of probable cause that any particular crime ha[s] been committed." *State v. Richards*, 294 N.C. 474, 491-92, 242 S.E.2d 844, 855 (1978) (citations omitted). In other words, general warrants are "not limited in scope and application." *Maryland v. King*, 569 U.S. 435, 466, 186 L. Ed. 2d 1, 32 (2013) (Scalia, J., dissenting). It is in the context of a warrant to search, however, that the State must make a proper showing of individualized suspicion and abide by "[t]he requirements of particularity of descriptions[,]" which are met only "when the warrant on its face leaves nothing to the discretion of the officer executing the warrant as to the premises to be searched and the activities or items which are the subjects of the proposed search." *Brooks v. Taylor Tobacco Enters., Inc.*, 298 N.C. 759, 762, 260 S.E.2d 419, 422 (1979) (citation omitted); *Richards*, 294 N.C. at 491-92, 242 S.E.2d at 855. The requirements of individualized suspicion and particularity operate precisely to prevent the government's use of general warrants—as our Supreme Court has noted, general warrants have been "abhorred since colonial days and [are] banned by both the Federal and State Constitutions." *Richards*, 294 N.C. at 491, 242 S.E.2d at 855 (citation and quotation marks omitted).

The satellite-based monitoring program grants a similarly expansive authority to State officials. State officials have the ability to access the details of a monitored defendant's private life whenever they see fit. A defendant's trip to a therapist, a church, or a family barbecue are revealed in the same manner as an unauthorized trip to an elementary school. At no point are officials required to proffer a suspicion or exigency upon which their searches are based or to submit to judicial oversight. Rather,

the extent of the State's ability to rummage through a defendant's private life are left largely to the searching official's discretion, constrained only by his or her will. *See*, *e.g.*, *State v. White*, 322 N.C. 770, 774, 370 S.E.2d 390, 393 (1988) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 29 L. Ed. 2d 564, 583 (1971)) (" 'The second, distinct objective [of the warrant requirement] is that those searches deemed necessary should be as limited as possible. Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings.' "). Thus, it is all the more critical that the State meet the requirement of otherwise showing the *reasonableness* of the satellite-based monitoring search.

This Court will not exhibit a more generous faith in our government's benign use of general warrants than did the Founders. In the Declaration of Rights of the North Carolina Constitution, the use of general warrants is explicitly condemned as "dangerous to liberty" and the Constitution mandates that general warrants "shall not be granted." N.C. Const. art. I, § 20. The Framers of the Fourth Amendment to the United States Constitution sought to prevent the use of general warrants as well. *See Payton v. New York*, 445 U.S. 573, 583, 63 L. Ed. 2d 639, 649 (1980) ("It is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment."); *see also* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 590 (1999) ("[The Framers] were concerned about a specific vulnerability in the protections provided by the common law; they were concerned that legislation might make general warrants legal in the future, and thus undermine the right of security in person and house. Thus, the framers adopted constitutional search and seizure provisions with the precise aim of ensuring the protection of person and house by prohibiting legislative approval of general warrants."). As pointed out in an unrelated case by Justice Newby of our Supreme Court, "the purpose of the Fourth Amendment is to impose a standard of reasonableness upon the exercise of discretion by governmental officials . . . in order to safeguard the privacy and security of individuals against arbitrary invasions[.]" *State v. Heien*, 366 N.C. 271, 278-279, 737 S.E.2d 351, 356 (2012) (citation and quotation marks omitted).

Given the unlimited and unfettered discretion afforded to State officials with the satellite-based monitoring system, the State's burden of establishing that the use of satellite-based monitoring will comply with

the Fourth Amendment's demand that all searches be "reasonable" is especially weighty.[3]

III.

In the case at bar, the State has failed to meet its burden of showing that the implementation of satellite-based monitoring of this Defendant will be reasonable notwithstanding the level of discretion afforded. That is, the State has not established the circumstances necessary for this Court to determine the reasonableness of a search fifteen to twenty years before its execution.[4]

We note that because the stated purpose of the satellite-based monitoring program is to discover evidence of criminal wrongdoing, Defendant's enrollment in that program cannot be said to be reasonable in light of the "special needs" exception to the warrant requirement, *Vernonia Sch. Dist. 47J*, 515 U.S. at 652-53, 132 L. Ed. 2d at 574, nor does the State argue such to be the case. Rather, if Defendant's continuous location accessing can be constitutional absent proper prior

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3. "The[] words [of the Fourth Amendment] are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure . . . ' from intrusion . . . by officers acting under the unbridled authority of a general warrant. Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer.' The historic occasion of that denunciation, in 1761 at Boston, has been characterized as 'perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." ' " *Stanford v. Texas*, 379 U.S. 476, 481-82, 13 L. Ed. 2d 431, 435 (1965) (quoting *Boyd v. United States*, 116 U.S. 616, 625, 29 L. Ed. 746, 749 (1886)).

4. The merits of this issue have not yet come before this Court. To date, we have only assessed the reasonableness of a satellite-based monitoring order at the time the defendant had already been subjected to monitoring. *Grady II*, 2018 N.C. App. LEXIS 460; *Griffin*, 2018 N.C. App. LEXIS 792. This case presents the Court's first analysis of the constitutionality of an order enrolling a defendant in the satellite-based monitoring program several years prior to the time at which that monitoring is expected to begin. *E.g.*, *State v. Greene*, ___ N.C. App. ___, 806 S.E.2d 343 (2017) (unnecessary to address the constitutionality of the trial court's satellite-based monitoring order because the State conceded that the evidence presented was insufficient to establish that the search was reasonable); *State v. Johnson*, ___ N.C. App. ___, 801 S.E.2d 123 (2017) (remanding the satellite-based monitoring order because the trial court did not conduct the appropriate reasonableness inquiry below).

judicial approval, it must be in light of its reasonableness pursuant to a general balancing approach. *See*, *e.g.*, *Samson*, *supra*. That analysis ordinarily involves an examination of the circumstances existing at the time of the search, including "the nature of the privacy interest upon which the search . . . intrudes"; "the character of the intrusion" itself and "the information it discloses"; as well as "the nature and immediacy of the governmental concern at issue . . . and the efficacy of th[e] means for meeting it." *Vernonia Sch. Dist. 47J*, 515 U.S. at 654, 658, 660, 132 L. Ed. 2d at 575, 577, 578, 579.

This Court was able to determine the reasonableness of the trial court's satellite-based monitoring orders in *Grady II* and *Griffin* because the defendants had already become subject to the monitoring at the time of our analyses. In *Grady II*, the trial court ordered the defendant to enroll in satellite-based monitoring at a "bring-back" hearing pursuant to N.C. Gen. Stat. § 14-208.40B, "more than three years after" the defendant's release. *Grady II*, 2018 LEXIS 460, at *11. We could thus examine the totality of the circumstances in order to determine the reasonableness of subjecting the defendant to satellite-based monitoring. For example, we considered the characteristics of the monitoring device that was currently in use; the manner in which the defendant's location monitoring was conducted as well as the purpose for which that information was used under the current statute; and the State's interest in monitoring that particular defendant in light of his "current threat of reoffending[.]" *Id.* at *13, 17. Based on these circumstances, we concluded that "the State failed to prove, by a preponderance of the evidence, that lifetime [satellite-based monitoring] of [the] defendant is a reasonable search under the Fourth Amendment." *Id.* at *22. Similarly, in *Griffin*, the "[d]efendant was instructed to appear for a 'bring-back' hearing to determine whether he would be required to participate in [the satellite-based monitoring] program." *Griffin*, 2018 N.C. App. LEXIS 792, at *2. At the hearing, the trial court " 'weighed the Fourth Amendment right of the defendant to be free from unreasonable searches and seizures with the publics [sic] right to be protected from sex offenders and . . . conclude[d] that the publics [sic] right of protection outweigh[ed] the "de minimis" intrusion upon the defendant's Fourth Amendment rights.' " *Id.* at *5. However, on appeal, this Court noted that "unless [satellite-based monitoring] is found to be effective to actually serve the purpose of protecting against recidivism by sex offenders, it is impossible for the State to justify the intrusion of continuously tracking an offender's location for any length of time, much less for thirty years." *Id.* at *11-12. We therefore concluded that "absent any evidence that satellite-based monitoring . . . is effective to protect the public from sex offenders, the trial

court erred in imposing [satellite-based monitoring] on [the defendant] for thirty years." *Id.* at *1.

In the instant case, the State's ability to establish reasonableness is further hampered by the lack of knowledge concerning the future circumstances relevant to that analysis. For instance, we are not yet privy to "the invasion which the search [will] entail[]." *Terry v. Ohio*, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 905 (1968) (alteration omitted) (citation and quotation marks omitted). The State makes no attempt to report the level of intrusion as to the information revealed under the satellite-based monitoring program, nor has it established that the nature and extent of the monitoring that is currently administered, and upon which the present order is based, will remain unchanged by the time Defendant becomes subjected to the monitoring. *Cf. Vernonia Sch. Dist. 47J*, 515 U.S. at 658, 132 L. Ed. 2d at 578 ("[I]t is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic. . . . And finally, the results of the tests . . . are not turned over to law enforcement authorities or used for any internal disciplinary function.") (citations omitted). Instead, the State's argument focuses primarily on the "limited impact" of the monitoring device itself. The State, however, provides no indication that the monitoring device currently in use will be similar to that which may be used some fifteen to twenty years in the future. *See State v. Spinks*, ___ N.C. App. ___, ___, 808 S.E.2d 350, 361 (2017) (Stroud, J., concurring) (citing *Riley*, ___ U.S. at ___, 189 L. Ed. 2d at 446-47) ("The United States Supreme Court has recognized in recent cases the need to consider how modern technology works as part of analysis of the reasonableness of searches."). Nor does the record before this Court reveal whether Defendant will be on supervised or unsupervised release at the time his monitoring is set to begin, affecting Defendant's privacy expectations in the wealth of information currently exposed. *Samson*, 547 U.S. at 850-52, 165 L. Ed. 2d at 258-59; *Grady II*, 2018 LEXIS 460, at * 11 ("Defendant is an unsupervised offender. He is not on probation or supervised release[.] . . . Solely by virtue of his legal status, then, it would seem that defendant has a greater expectation of privacy than a supervised offender."); *see also Vernonia Sch. Dist. 47J*, 515 U.S. at 654, 132 L. Ed. 2d at 575 ("[T]he legitimacy of certain privacy expectations vis-à-vis the State may depend upon the individual's legal relationship with the State.").

The State has also been unable at this point to adequately establish—on the other side of the reasonableness balance—the government's "need to search[.]" *Terry*, 392 U.S. at 21, 20 L. Ed. 2d at 905 (citation and quotation marks omitted). The State asserts only that "[i]f, as Defendant

acknowledges, the State has 'a substantial interest in preventing sexual assaults,' then the State's evidence amply demonstrated that Defendant warranted such concern in the future despite his STATIC-99 risk assessment score." However, the State makes no attempt to distinguish this interest from " 'the normal need for law enforcement[.]' " *State v. Elder*, 368 N.C. 70, 74, 773 S.E.2d 51, 54 (2015) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873, 97 L. Ed. 2d 709, 717 (1987)); *see also King*, 569 U.S. at 481, 186 L. Ed. 2d at 41 (Scalia, J., dissenting) ("Solving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches. *The Fourth Amendment must prevail*.") (emphasis added). In addition, to the extent that the current satellite-based monitoring program is justified by the State's purpose of deterring future sexual assaults, the State's evidence falls short of demonstrating what Defendant's threat of recidivating will be after having been incarcerated for roughly fifteen years.[5] *E.g.*, *Brown v. Peyton*, 437 F.2d 1228, 1230 (4th Cir. 1971) ("One of the principal purposes of incarceration is rehabilitation[.]"). The only individualized measure of Defendant's threat of reoffending was the Static-99, which the State's witness characterized as indicating that Defendant was "not likely" to recidivate. Lambert, the State's only witness, was asked "what, if any, information do you have that would forecast—besides the Static-99, which would seem to indicate [Defendant] has no real likelihood of recidivism here, do you have any other evidence that would indicate the reason that the State of North Carolina would need to search his location or whereabouts on a regular basis?" Lambert responded, "I don't have any information on that[.]"

Without reference to the relevant circumstances that must be considered, the State has not met its burden of establishing that it would otherwise be reasonable to grant authorities unlimited discretion in searching—or "obtaining"—Defendant's location information upon his release from prison. *Jones*, 565 U.S. at 404, 181 L. Ed. 2d at 918. Authorizing the State to conduct a search of this magnitude fifteen to twenty years in the future based solely upon scant references to present circumstances would defeat the Fourth Amendment's requirement of circumstantial reasonableness altogether.

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5. We are cognizant of the fact that Defendant's Static-99 score was based in part upon his age at the likely time of release. However, this factor takes into account only Defendant's age, and not how long he will be incarcerated or his potential for rehabilitation while incarcerated.

Nevertheless, our concurring colleague urges that our holding today "imposes a burden on the State to predict the future." This is not the case. It is the Fourth Amendment that imposes a burden on the State to establish the reasonableness of its searches, and an individualized determination of reasonableness in time, place, and manner is a routine duty of judges. Our General Assembly in the instant case has tasked the State, pursuant to N.C. Gen. Stat. § 14-208.40A, with meeting that burden decades in the future. As "an error-correcting body, not a policy-making or law-making one[,]" *Fagundes v. Ammons Dev. Grp., Inc.*, ____ N.C. App. ___, ___, 796 S.E.2d 529, 533 (2017) (citation and quotation marks omitted), we are constrained to follow precedent and statutes as written, and not as we might wish them to be. Moreover, we do not hold that it is not possible for the State to meet this challenge. Rather, our holding is simply that, in the case at bar, the State has failed to do so.

Conclusion

It may be that the trial court's order would be reasonable in the year 2032. The State, however, has failed to establish that to be the case. Accordingly, we necessarily conclude that the trial court's order enrolling Defendant in the satellite-based monitoring program upon his eventual release from prison is unconstitutional as applied to him. We therefore vacate the trial court's order. Because the instant case is the first in which this Court has addressed the merits of the reasonableness of an order entered pursuant to N.C. Gen. Stat. § 14-208.40A, we remand with instructions for the trial court to dismiss the State's application for satellite-based monitoring without prejudice to the State's ability to reapply. *Cf. State v. Greene*, ___ N.C. App. ___, 806 S.E.2d 343 (2017).

VACATED AND REMANDED.

Judge HUNTER, JR. concurs.

Judge DIETZ concurring in the judgment by separate opinion.

DIETZ, Judge, concurring in the judgment.

I agree with the majority that this case is controlled by our recent decisions in *State v. Griffin*, __ N.C. App. __, __ S.E.2d __, 2018 N.C. App. LEXIS 792 (2018), and *State v. Grady*, __ N.C. App. __, __ S.E.2d __, 2018 N.C. App. LEXIS 460 (2018) (*Grady II*). Under this precedent, the State failed to meet its burden to justify satellite-based monitoring in this case.

I cannot join the majority's decision to expand the reasoning of *Griffin* and *Grady II* to require the State to address future, speculative facts that do not exist today. That portion of the majority's holding renders our State's satellite-based monitoring program unconstitutional in virtually every future case. This is so because the statute requires the State to conduct the initial satellite-based monitoring hearing at the time of criminal sentencing. N.C. Gen. Stat. § 14-208.40A.

Satellite-based monitoring is imposed on offenders who commit heinous crimes such as child sex offenses and sexually violent offenses. N.C. Gen. Stat. §§ 14-208.40, 14-208.6(4). These are not offenders who expect to be sentenced to time served or immediately released on probation. Thus, in the vast majority of satellite-based monitoring cases, the offender will first serve time in prison before being released and subjected to monitoring.

I disagree with the majority's view that the State must divine all the possible future events that might occur over the ten or twenty years that the offender sits in prison and then prove that satellite-based monitoring will be reasonable in every one of those alternate future realities. That is an impossible burden and one that the State will never satisfy.

Those convicted of crimes, "especially very serious crimes such as sexual offenses against minors, and especially very serious crimes that have high rates of recidivism such as sex crimes, have a diminished *reasonable* constitutionally protected expectation of privacy." *Belleau v. Wall*, 811 F.3d 929, 936 (7th Cir. 2016). In my view, if the State can show, based on the facts that exist today, that a convicted sex offender is so dangerous to society that satellite-based monitoring will be necessary to protect the public upon that offender's release, then imposition of monitoring—even if it will not occur until some future time—can withstand constitutional scrutiny. After all, if facts change in the ways the majority speculates—the offender becomes disabled; technology radically changes; society becomes less tolerant of government monitoring of convicted sex offenders—the defendant can assert a *Grady* challenge at that time and the State will bear the burden of showing reasonableness based on those new facts.

The majority instead imposes a burden on the State to predict the future. The Fourth Amendment does not require that level of clairvoyance. I believe society is prepared to accept as reasonable the imposition of future satellite-based monitoring on dangerous convicted sex offenders when the State has shown, based on the facts known today, that those offenders likely will pose a threat to society upon their release—particularly when those offenders can challenge the reasonableness of that monitoring if the facts change.

STATE v. MATHIS

[261 N.C. App. 263 (2018)]

STATE OF NORTH CAROLINA
v.
CHARLES T. MATHIS, DEFENDANT

No. COA17-1302

Filed 4 September 2018

1. Indictment and Information—unlawfully accessing government computer—sufficiency of indictment

An indictment against a bail bondsman for unlawfully accessing a government computer was sufficient even though defendant contended that his inadvertent failure to accurately report his transactions could not be considered intentional because the State compelled him to complete and submit monthly reports. That argument had no bearing on the validity of the indictment.

2. Crimes, Other—unlawfully accessing government computer—direct or indirect—submission of bail bond reports

The trial court did not err by denying a bail bondsman's motion to dismiss charges for unauthorized access to a government computer under N.C.G.S. § 14-454.1 deriving from submission of reports to the State. While defendant had authorization to use the system, defendant exceeded that authorization by inputting fraudulent information. Moreover, even if defendant did not directly enter the questioned reports, his conduct comes within the plain language of the statute which includes the phrases "access or cause to be accessed" and "directly or indirectly."

3. Appeal and Error—preservation of issues—double jeopardy—not raised below

Defendant failed to preserve the issue of double jeopardy in being charged with false pretenses and unlawfully accessing a government computer where he based his argument on a civil action resulting in the revocation of his bail bonds license and did not bring forth an argument about a lesser included offense. The trial court did not make a determination on this issue.

4. Crimes, Other—monthly bail bond reports—falsification—sufficiency of evidence

The trial court did not err by denying a bail bondsman's motion to dismiss a charge that he violated N.C.G.S. § 58-71-165 by submitting his required reports to the State with omissions. Although defendant contended that the omissions were clerical errors committed by staff, the State presented evidence of false reports, of

defendant signing the attestation clause, and of the reports being filed. Whether the omissions were fraudulent or clerical errors were issues of fact to be determined by the jury.

5. False Pretense—obtaining something of value—bail bond license—causation with false representation

The trial court erred by denying a bail bondsman's motion to dismiss an obtaining property by false pretenses charge arising from his submission of computerized reports to the State. Defendant already had his bail bondsman's license; while the State likens obtaining to retaining, retain is not within the definition of obtain. The Department of Insurance has different processes and requirements for the two, and the assertion that defendant obtained a renewal is not what the State alleged in the indictment.

6. Evidence—false pretense in obtaining bail bond license—selective prosecution—questioning of former insurance commissioner limited

The trial court did not erroneously limit questioning of a former insurance commissioner by a bail bondsman accused of obtaining property (his license) by false representations. The trial court directed defendant, who appeared pro se and alleged selective prosecution, to ask questions which would bring forth relevant testimony and then allowed defendant to ask several more questions of the witness.

7. Criminal Law—selective prosecution—prima facie showing—false pretenses—bail bond license

A bail bondsman charged with obtaining his license by false pretenses through false reports did not make a prima facie showing of selective prosecution. The testimony defendant elicited did not, as he contended, show a lack of prosecution of bail bondsmen for filing false reports.

Appeal by Defendant from judgment entered 18 July 2017 by Judge Martin B. McGee in Union County Superior Court. Heard in the Court of Appeals 6 June 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel Snipes Johnson, for the State.

Thomas Law, P.A., by Albert S. Thomas, Jr. and Catherine T. Andrews, and Narron & Holdford, P.A., by I. Joe Ivey, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Charles T. Mathis ("Defendant") appeals following jury verdicts convicting him of obtaining property by false pretenses, falsification of monthly bail bond report information, and unlawfully accessing a government computer. On appeal, Defendant brings forth the following arguments: (1) the indictment charging him for unlawfully accessing a government computer was fatally defective; (2) the trial court erred in denying his motion to dismiss the unlawfully accessing a government computer charge; (3) the indictments for unlawfully accessing a government computer and obtaining property by false pretenses infringe his constitutional right to avoid double jeopardy; (4) the trial court erred in denying his motion to dismiss the falsifying bail bond report information and obtaining property by false pretenses charges; and (5) the State violated his constitutional right of equal protection by selectively prosecuting him. We find no error in part, dismiss in part, reverse in part, and remand for resentencing.

I. Factual and Procedural Background

On 1 June 2015, a Union County Grand Jury indicted Defendant for unlawfully accessing a government computer, falsification of bail bond report information, and obtaining property by false pretenses. On 6 July 2015, Defendant waived his right to counsel, opting to proceed *pro se*.

On 2 July 2017, the court called Defendant's case for trial. Through a series of four witnesses, the State began its case introducing court records of Defendant's bonds, the Department of Insurance's procedures and requirements for licensing of bail bondsmen, and Defendant's bank accounts, which showed delinquencies.

The State first called Catherine Morrison, Clerk of the Union County Superior Court. Morrison maintains the bail bond records of the criminal division of court. Through her testimony, Morrison identified and the State introduced into evidence twenty-four bond forfeiture notices signed by Defendant. Of the twenty-four bonds the State introduced, eighteen bonds are listed in the indictments for unlawfully accessing a government computer and falsification of monthly bail bond report information. Six other bonds are only listed in the indictment for the falsification of monthly bail bond report information. For twelve of the bonds listed in both indictments, Defendant received $3,225 in premium fees. Defendant received the following amounts: (1) $500 for Jonathan Sheppard's bond; (2) $100 for Joshua Newton's bond; (3) $400 for James Massey's bond; (4) $375 for Ronnie Marble's bond;

(5) $100 for one of Justin Maldonado's bonds;[1] (6) $100 for another one of Justin Maldonado's bonds; (7) $300 for Dennis Knox's bond; (8) $75 for Xandria Harris's bond; (9) $200 for Elizabeth Greene's bond; (10) $75 for Cortez Grace's bond; (11) $800 for Tammy Evans's bond; and (12) $200 for Tyrone Alsbrooks's bond. This testimony established the funds Defendant received during this period of time, which includes bonds he should have listed in his daily logs and monthly reports, as explained hereafter.

The State then called Frank Bradley, an employee of U.S. Bank National Association ("U.S. Bank"). U.S. Bank maintains Defendant's security account required by the North Carolina's bail bondsman program, see discussion *infra*. Bank records introduced through Bradley show Defendant's bank accounts had the following funds deposited: (1) on 31 December 2008, $22,173.67; (2) on 31 December 2009, $22,040; (3) from 1 January 2010 to 31 December 2010, $21,960; (4) on 31 December 2011, $21,800; (5) on 31 December 2012, $21,800; (6) on 31 December 2013, $21,800; and (7) in June 2014, $21,800. On 2 December 2014, Defendant deposited $178,300. On 31 December 2014, Defendant's account held a cash on hand balance of $200,100. These funds establish the dollar amount of individual bonds Defendant could issue under Department of Insurance regulations, as explained *infra*.

The State next called Keisha Burch, a complaint analyst in the Bail Bond Regulatory Division of the Department of Insurance, for the purpose of explaining the process of becoming a licensed bail bondsman.[2] Burch explained an applicant must take a pre-licensing bond course and pass the course's examination. If successful, an applicant then applies for a State license and is investigated to establish his qualifications. Once qualified, the Department of Insurance sends him a letter, authorizing him to take a State administered examination. In the event the applicant passes, the applicant is required to deposit a minimum amount of

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1. Justin Maldonado's and Cortez Grace's bonds were only included in the falsification of monthly bail bond report information indictment. All other bonds were in both the unlawfully accessing a government computer indictment and falsification of monthly bail bond report information indictment.

2. The North Carolina Department of Insurance governs bail bondsmen in North Carolina. The Department of Insurance is split into three divisions: (1) the Bail Bond Regulatory Division, which analyzes complaints and conducts investigations of alleged bail bond violations; (2) the Criminal Investigations Division, which investigates alleged criminal violations arising under Chapter 58 of the General Statutes; and (3) the Agent Services Division, which handles regulation licensing, collection of license fees, and renewal of licenses.

$15,000 in a security account (similar to the one Defendant established at U.S. Bank). The security account allows the Department of Insurance to match the funds deposited to the amount of bonds written.

Next, Burch explained the process of license renewal. Bondsmen hold licenses for one year. Before the annual expiration date, the Department of Insurance sends bail bondsmen a notice of renewal. To be renewed, a bondsman must complete the paperwork before the deadline, pay renewal fees, and complete required continuing education. If renewed, the bondsman does not obtain a new license, but retains his existing license for another year. As long as a bondsman properly renews his license, he continuously holds his license through successive renewal periods.

In the event a lapse occurs in the license for non-renewal, the bondsman is required to reapply. Upon reapplication, the bondsman would receive a new license, but not a new license number.

All bondsmen have to retain a security deposit fund in a special security account, which "is an account that [the Department of Insurance has] for the professional bail bondsman to deposit money." The amount on deposit regulates both the dollar amount of any individual bond a bondsman can issue and the total aggregate dollar amount of bonds a bondsman can issue in two ways.

The Department of Insurance's rules are known as the "one quarter rule" and the "eight times rule[.]" Under the one quarter rule, the bondsman cannot write bonds for more than one quarter of the deposit amount for any single individual. Under the eight times rule, the bondsman can, in the aggregate, only write bonds equal to a sum of eight times the amount deposited in the account. Several witnesses illustrated the rules as follows. First, under the one quarter rule: (1) if a bondsman had a $20,000 deposit, the largest amount of a bond he could write for one individual would be a $5,000 bond; or (2) with a $15,000 deposit, he could write a $3,750 bond for one individual. Under the eight times rule, with a $20,000 deposit, the bondsman could write up to $160,000 in bonds.

To document bonds written against the security deposit on hand, bondsmen are legally required to keep monthly reports of the bonds they issue. Monthly reports are "reports that are sent in by the professional bondsman only of all of the bonds that they have written that are currently outstanding[,]" as of the fifteenth of the month. Bondsmen are required to file the monthly reports with the Department of Insurance.

Burch identified and the State introduced the Department of Insurance's "demographic record" for Defendant.[3] The demographic record showed the following. Defendant first became licensed on 26 February 1998. At the time of trial, Defendant held an active professional bail bond license, surety bail bond license, and bail runner license.

The State introduced Defendant's monthly reports from December 2008 to July 2014. On the bottom of each monthly report, Defendant signed an attestation clause, certifying he was "submitting a true and accurate report."

On 11 April 2013, Burch sent Defendant a notice of deficiency. The letter stated the Department of Insurance reviewed Defendant's March 2013 report and determined the amount in his security deposit was deficient. On 24 November 2014, the Department of Insurance sent Defendant another notice of deficiency. In response to the notice, Defendant cured the deficiency by depositing $178,200 in his security account.

The State next called Steve Bryant, a senior complaint analyst in the Bail Bond Regulatory Division of the Department of Insurance. Bryant sent Defendant the 24 November 2014 notice of deficiency. The notice indicated the Department of Insurance received information Defendant omitted bonds in his monthly reports.[4] The notice also asserted Defendant exceeded both the one quarter and eight times rules for two individuals' bonds, Randall Shehane and Martin Cavanaugh.[5] Defendant wrote Shehane a $50,000 bond and Cavanaugh a $10,000 bond. At the time he wrote those two bonds, Defendant maintained a $21,800 deposit in his security account. This created a deficiency under the one quarter rule, because with $21,800 on deposit, Defendant could only write bonds up to $5,450 per individual (Burch's testimony indicated Defendant cured this deficiency).[6]

After Bryant's direct examination, Defendant cross examined Bryant in support of his theory of selective prosecution. Bryant testified he

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3. Although the State introduced into evidence Defendant's demographic record, it is not included in the record on appeal.

4. Bryant's testimony did not state who gave the Department of Insurance this information.

5. These individuals' names are spelled differently in the bonds and in the trial transcript.

6. Bryant did not explain how Defendant violated the eight times rule.

spoke with Timothy Pardeau, a criminal investigator. Bryant "referred" certain documents to the Criminal Investigations Division.

Defendant asked the following:

> Q. And how many professional bondsmen have you investigated for this type of alleged activity?
>
> A. I don't have an exact count.
>
> Q. Could you give us a general idea, 10, 50, 100?
>
> A. It's approximately 20, if I were to take a guess.
>
> Q. And out of those 20, -- out of those 20, how many of those have you ever criminally charged with violations?
>
> A. I don't have authority to criminally charge anybody.
>
> Q. How many of those 20 have you ever known to be criminally charged for those violations?
>
> A. Again, that would be a question for the Criminal Investigations Division. I don't have -- I'm not a sworn officer, I cannot -- I don't have privy to that information.
>
> Q. Do you know of any criminal investigations that have been from the 20 people that you investigated alleged complaint?
>
> A. I know you as one of them and I believe your brother Robert Mathis was also charged.
>
> Q. Would one of the other ones be a Roland Loftin?
>
> A. Again, I don't know if he was charged. That again would be a question for Criminal Investigations Division.
>
> Q. Other than me and my brother, do you know of or have you heard of any other professional bondsman that has ever been charged with a criminal charge concerning monthly reports and reporting issues by one of these 20 people?
>
> A. I don't recall anybody informing me of that.
>
> Q. So your answer is that nobody has been charged that you know of other than me and my brother?
>
> A. I'm not aware of it.

The State called Timothy Pardeau, an investigator in the Criminal Investigations Division of the Department of Insurance. In 2014,[7] Pardeau's supervisor assigned him Defendant's case, which was based on "an allegation that there was some bonds that were written by [Defendant] that were not reported on the monthly reports." In the beginning of his investigation, Pardeau contacted the Agent Services Division for access to Defendant's monthly reports. Pardeau collected bonds Defendant wrote from the Clerk of Court's office. Pardeau reviewed the bonds and monthly reports to determine if any bonds were missing from the reports.

Pardeau "discovered that there was numerous bonds that had been written by [Defendant] under his professional license utilizing the seals that had not been reported on his monthly reports to Agent Services Division." The State introduced, without objection, an excel spreadsheet Pardeau created as part of his investigation. The spreadsheet showed twenty-four bonds missing from Defendant's monthly reports, from 2008 to 2014. These were the twenty-four bonds admitted during Morrison's testimony and included in the unlawfully accessing a government computer and falsification of monthly bail bond report information indictments. Defendant omitted two bonds from only one monthly report. However, Defendant failed to include another bond, for $40,000, in thirty-one monthly reports: (1) December 2008; (2) January, February, March, April, May, October, November, and December 2009; (3) January, February, March, May, June, July, September, November, and December 2010; (4) March, April, May, June, July, August, September, October, November, and December 2011; and (5) January, February, and April 2012. The highest balance Defendant had during those five years was $22,173.67. Under the one quarter rule, Defendant could only write a $5,543.42 bond.

Our examination of the spreadsheet and testimony shows the following. As an example of how Defendant profited from withholding information, in 2011, Defendant kept a $21,800 balance in his security account. Under the one quarter rule, Defendant could write only a $5,450 bond. Pardeau found four bonds—in the amounts of $10,000, $10,000, $40,000, and $50,000—not included in the monthly reports during 2011. For one of the $10,000 bonds, Defendant received $800 in bond premium. Defendant did not earn any bond premium on the other $10,000 bond or the $40,000 and $50,000 bonds. However, to issue a

7. Pardeau testified he first started investigating "in the latter half of 2014."

$50,000 bond, Defendant would need $200,000 deposited in his security account, $178,200 more than his deposit amount in 2011. Also, in 2011 and 2012, Defendant omitted a $10,000 bond for defendant Alsbrooks. Due to his account balance in 2011 and 2012, Defendant could only issue bonds in the amount of $5,450 and still comply with the one quarter rule. Defendant earned $200 in bond premium for the Alsbrooks's bond.

When asked how Defendant obtained property by false pretenses, Pardeau explained:

> The basis of my obtaining property by false pretense was the fact that you submitted an application for a bail bonding license. Had they known that fraud was being committed or monthly reports were being falsely submitted, my assumption would be that they would not have given you a license because that's a felony in the State of North Carolina, convicted felons are not allowed to hold bail bonding licenses.

Defendant asked Pardeau if he could testify he knew Defendant "physically, personally generated and submitted to the SBS system[.]" Pardeau answered:

> I can only testify as to what I just said, sir, that your user name and password was utilized to access the State system and that your e-mail was utilized to submit these reports and that your signature was on the bottom of some of these reports, or many of these reports, not all.

Additionally, some reports were sent from Defendant's email.[8]

The State rested.[9] Defendant moved to dismiss all the charges. The trial court denied Defendant's motion.

Defendant called Wayne Goodwin, the former Commissioner of the Department of Insurance. When Defendant began to question Goodwin about his relationships with members of the North Carolina Bail Agent's Association, the State objected on relevance grounds. Defendant argued Goodwin's testimony would show he "was in office when these charges were brought [and] will show that he was working as the Department to get rid of me and the company that I work with[.]" Defendant also

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8. Defendant contends the State did not present evidence he sent these emails.

9. The State also called: (1) Kayla Vann, the records custodian for the North Carolina Department of Revenue; and (2) Bryan Huncke, a sergeant with the Union County Sheriff's Office.

asserted Goodwin's testimony would show he selectively enforced the laws against Defendant.

The court allowed Defendant to make a proffer. After Defendant asked Goodwin six additional questions, the court stated it was "having . . . difficulty finding how this is at all relevant to anything." The court asked Defendant to "please get to something that . . . is relevant to the issues that are being tried[,]" and said, "if [Defendant] wish[ed] to ask him some questions that would make this relevant, [it]'d be happy to consider it[.]" Defendant responded, "without going through a bit more I would just say I'm good with that and I'll be done with this witness." The court asked Defendant if he wished to be heard on the issue of relevancy. Defendant requested he be allowed to ask one more question. The court agreed to one more question. The court allowed Defendant to ask six more questions, and Defendant ended his proffer.

Defendant called Rebecca Shigley, a former deputy commissioner of the Agent Services Division of the Department of Insurance. Shigley investigated a complaint about Defendant, which Phillip Bradshaw, a licensed bail bondsman on the board of the North Carolina Bail Agent's Association, sent. After receiving the complaint, Shigley referred the matter over to the Criminal Investigations Division. During Shigley's investigation, she met with Defendant, along with an attorney from the Department of Justice. At the meeting, Defendant asserted the issues in his monthly reports arose from the person submitting the reports omitting the last three lines of the report.

The following questioning occurred:

> Q. Ms. Shigley, to your knowledge how many professional bail bondsman have ever been charged for clerical errors on monthly reports?
>
> A. I do not know.
>
> Q. During your tenure do you have any idea?
>
> A. I do not know.
>
> Q. Are you appri[s]ed of the people that are charged once y'all -- if the investigation is done?
>
> …
>
> A. I'm sorry. Agent Services Division does not handle any criminal matters. If when we are reviewing a complaint we find that there are -- possibly are criminal violations,

> we refer it over to the Criminal Investigations Division and they generally do not appri[s]e us of the case after that.
>
> Q. And so when you get a complaint that could possibly be a felony charge or a criminal violation, the ASD doesn't investigate that, they send that to the CID; correct?
>
> A. That's correct, that's our procedure.
>
> Q. And under your senior tenure as the deputy, was it your policy that any investigation that was done on a criminal activity be done through the Criminal Investigative Division for a criminal offense?
>
> A. It was our policy that as we were reviewing a complaint if there was an administrative complaint the Agent Services Division would handle it and if part of the complaint or the whole complaint was a criminal -- possible criminal matter, we referred it to the Criminal Investigations Division to handle as they deem appropriate.

When asked how many bondsman she knew the State criminally charged for violation of the reporting laws, Shigley answered, "We handle administrative things so I'm not always aware of the criminal charges, but I do know that there were two bail bondsman that were charged criminally based on bail bondsman monthly reports." Those two people were Defendant and his brother. However, Shigley did "know of several professional bail bondsman that had additionally regulatory action taken against their bail bondsman license and there several complaints" during her time in the Agent Services Division.

Defendant rested and renewed his motion to dismiss. The trial court denied Defendant's motion.

During deliberations, the jury asked the court to define property. The State asserted "it's pretty clear the property that is referred to in the indictment is the bail bondsman's license." The jury returned to the courtroom, and the court instructed, "property is not defined in the statute and . . . we ask that you use your good judgment and common sense at arriving at your understanding of what the term property means." The jury found Defendant guilty of obtaining property by false pretenses, falsification of monthly bail bond report information, and unlawfully accessing a government computer. The court consolidated the offenses and sentenced Defendant to 13 to 25 months imprisonment. Defendant gave oral notice of appeal.

II. Standard of Review

We review the sufficiency of an indictment for subject matter jurisdiction, Defendant's double jeopardy argument, and his claim of selective prosecution *de novo*. *State v. Collins*, 221 N.C. App. 604, 610, 727 S.E.2d 922, 926 (2012) (citation omitted) (reviewing an indictment *de novo*); *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted) (reviewing constitutional claims *de novo*).

We also review motions to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (internal citations, quotation marks, and italics omitted) (alteration in original).

III. Analysis

Defendant brings forth the following arguments: (1) the indictment charging him for unlawfully accessing a government computer was fatally defective; (2) the trial court erred in denying his motion to dismiss the accessing a government computer charge; (3) the State violated his constitutional right against double jeopardy; (4) the trial court erred in denying his motion to dismiss the falsifying monthly bail bond report information charge; (5) the trial court erred in denying his motion to dismiss the obtaining property by false pretenses charge; and (6) the

State violated his constitutional right of equal protection by selectively prosecuting him. We address these arguments in turn.

A. Validity of the Indictment

[1] Defendant first argues the indictment failed to sufficiently allege the essential elements of the crime. Specifically, Defendant alleges his acts were not willful or with criminal intent because the Department of Insurance required him to submit monthly reports.

The State charged Defendant for violation of N.C. Gen. Stat. § 14-454.1, which states:

> (a) It is unlawful to willfully, directly or indirectly, access or cause to be accessed any government computer for the purpose of:
>
> (1) Devising or executing any scheme or artifice to defraud, or
>
> (2) Obtaining property or services by means of false or fraudulent pretenses, representations, or promises.
>
> A violation of this subsection is a Class F felony.
>
> (b) Any person who willfully and without authorization, directly or indirectly, accesses or causes to be accessed any government computer for any purpose other than those set forth in subsection (a) of this section is guilty of a Class H felony.

N.C. Gen. Stat. § 14-454.1 (a)-(b) (2017).

A valid indictment must contain:

> (1) the identification of the defendant; (2) a "separate count addressed to each offense charged"; (3) the county in which the offense took place; (4) the date, or range of dates, during which the offense was committed; (5) a "plain and concise factual statement in each count" that supports every element of the offense and the defendant's commission thereof; and (6) the "applicable statute, rule, regulation, ordinance, or other provision of law alleged therein to have been violated.

State v. Golder, ___ N.C. App. ___, ___, 809 S.E.2d 502, 505-06 (2018) (citing N.C. Gen. Stat. § 15A-924(a)(1)-(6) (2017)). "As a general rule, an indictment couched in the language of the statute is sufficient to charge

the statutory offense." *Id.* at ___, 809 S.E.2d at 506 (quotation marks and citation omitted).

The substantive portion of the indictment at issue reads:

> The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did access by means of inputting information as part of required monthly reports on outstanding bond obligations under N.C.G.S. 58-71-165 the government computer system operated and maintained by the North Carolina Department of Insurance (a State Government entity) in order to commit fraud. Specifically the defendant entered and submitted information falsely by withholding specific bond liabilities outstanding in the following defendants' criminal matters: [(listed fourteen defendants)]. These bonds were withheld while submitting as an accurate accounting other bond obligations, and thus falsely represented his total amount of outstanding liability. This was done for the purpose of obtaining property - a professional bail bondsman's license - as well as money and fees (premiums) charged in connection with the bonding of individuals, which was done under the Defendant's professional bonding license, as well as to maintain a lower balance in the monthly required securities account maintained according to the North Carolina General Statutes.

Defendant contends the State failed to prove willfulness because the State compels Defendant to keep monthly bail bond reports. Defendant contends if the State compelled him to complete and submit monthly reports, then his inadvertent failure to accurately report his transactions cannot be considered intentional. This argument has no bearing on the validity of the indictment and is addressed *infra*.[10]

B. Motion to Dismiss Accessing A Government Computer Charge

[2] Next, Defendant argues the court erred in denying his motion to dismiss his charges under N.C. Gen. Stat. § 14-454.1. Defendant brings

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10. In the issue heading, Defendant asserts the State charged him with a vague and overly broad indictment. Defendant brought forth no substantive argument in support of these contentions.

forth the following issues: (1) whether his actions meet the definition of willful[11] or "without authorization"; and (2) whether his actions constituted accessing or causing to be accessed a government computer.

1. Willful or Without Authorization

First, we address willfulness and without authorization. Our review of the plain language of the statute shows the subsection under which the State charged Defendant, included *supra*, does not include the words "without authorization."

For computer-related crimes, our General Assembly defines "Authorization" as: "having the consent or permission of the owner, or of the person licensed or authorized by the owner to grant consent or permission to access . . . not exceeding the consent or permission." N.C. Gen. Stat. § 14-453 (1a) (2017). When our Supreme Court reviewed willfulness for another computer-related crime, it applied the traditional definition of willful and not the definition of "authorization" in N.C. Gen. Stat. § 14-453(1a). *State v. Ramos*, 363 N.C. 352, 355, 678 S.E.2d 224, 226 (2009) (citation omitted). Additionally, this Court has both included the definition of "authorization" in its analysis of willful and has omitted the definition and only required the State to produce substantial evidence of the traditional definition of willful. *Compare State v. Johnston*, 173 N.C. App. 334, 618 S.E.2d 807 (2005) (using the "authorization" definition), *with State v. Ramos*, 193 N.C. App. 629, 668 S.E.2d 357 (2008), *aff'd*, 363 N.C. 352, 678 S.E.2d 224 (2009) (distinguishing the traditional definition of willful and the definition of authorization). We note the terms "without authorization" and "willfulness" do not fully encompass each other. Indeed, when a defendant challenged jury instructions which only included the definition of "without authorization" but not the definition of "willfulness", this Court stated "[o]ne may act 'without authorization,' but still not act willfully." *Ramos*, 193 N.C. App. at 636, 668 S.E.2d at 363.

Unlike N.C. Gen. Stat. § 14-454.1 (b) and (c), which both include the words "willfully" and "without authorization", subsection (a) only requires "willful[ ]" action. N.C. Gen. Stat. § 14-454.1 (a)-(c).[12] However,

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11. In support of his argument, Defendant cites to "the reasons stated above in Issue I[.]"

12. Subsection (c) states, "Any person who willfully and without authorization, directly or indirectly, accesses or causes to be accessed any educational testing material or academic or vocational testing scores or grades that are in a government computer is guilty of a Class 1 misdemeanor." N.C. Gen. Stat. § 14-454.1 (c).

our Court read the "without authorization" requirement into the definition of "willful" for this very subsection in *State v. Barr*, 218 N.C. App. 329, 721 S.E.2d 395 (2012).

In *Barr*, the defendant brought forth the same argument asserted in the case *sub judice*—whether her actions were willful. Barr owned and operated Lexington License Plate Agency and worked as a title clerk. *Id.* at 331, 721 S.E.2d at 397-98. After the sale of a vehicle, a car dealer transfers title by delivering the paperwork to a license plate agency. *Id.* at 331, 721 S.E.2d at 398. At the agency, a title clerk checks the paperwork and "accesses a computer system called State Title and Registration System ('STARS')" to enter in the title clerk's "unique" number and a password. *Id.* at 331, 721 S.E.2d at 398. After a title clerk enters the information for a transfer, the title clerk can process the transfer of title. *Id.* at 331, 721 S.E.2d at 398.

Barr transferred titles for Lanier Motor Company; however, in 2008, Lanier lost its license and continued to sell vehicles without a license. *Id.* at 332, 721 S.E.2d at 398. When another title clerk tried to enter Lanier's dealer identification number into STARS, the computer noted the number was invalid. *Id.* at 332, 721 S.E.2d at 398. The clerk entered "OS" into the system, indicating the dealer was an out-of-state dealer. *Id.* at 332, 721 S.E.2d at 398. There was conflicting evidence if Barr herself instructed others to enter OS, or if someone from the DMV instructed Barr to input OS. *Id.* at 332, 721 S.E.2d at 398. One witness testified when he told Barr that Lanier's dealer number was inactive, Barr replied "to go ahead and process it an as O S[.]" *Id.* at 339, 721 S.E.2d at 402.

A jury convicted Barr of three counts of unlawfully accessing a government computer for a fraudulent purpose and two counts of aiding and abetting the unlawful access of a government computer. *Id.* at 333, 721 S.E.2d at 399. On appeal, Barr argued the State did not introduce substantial evidence of willfulness because evidence showed she believed a DMV worker instructed her to input certain information into the government computer. Our Court concluded, taken in the light most favorable to the State, the State presented substantial evidence of Barr's willfulness to violate N.C. Gen. Stat. § 14-454.1(a)(2), because the testimony showed Barr acted "purposely and deliberately, indicating a purpose to do it without authority—careless whether [s]he has the right or not—in violation of the law[.]" *Id.* at 340, 721 S.E.2d at 403 (citation and quotation marks omitted) (second alteration in original).

To our Court, it is telling in *Barr*, defendant had authorization to utilize and access STARS. However, she did *not* have authorization

to input the fraudulent information she inputted—to transfer title for an unlicensed in-state dealer and label the transfer as one for an out-of-state dealer. Similarly, here, Defendant had the authorization to use the SBS system. However, Defendant exceeded that authorization by inputting fraudulent information. The State submitted substantial evidence of Defendant inputting fraudulent information into the SBS system and the willfulness of his actions. Defendant's argument lacks merit.

2. Accessing a Government Computer

Second, "Access" is defined as "to instruct, communicate with, cause input, cause output, cause data processing, or otherwise make use of any resources of a computer, computer system, or computer network." N.C. Gen. Stat. § 14-453 (1). The unlawfully accessing a government computer statute includes both direct and indirect access of a government computer. N.C. Gen. Stat. § 14-454.1 (a).

Defendant asserts "sending information by SBS or e-mail does not" meet the definition of access, as he merely transmitted information, which the Department of Insurance's personnel actually uploaded into the system. While Defendant contends he did not personally access a government computer, he also states he "submitted information as required by the Department of Insurance using the computer system . . . ."

We conclude the State presented substantial evidence Defendant accessed, or caused another to access, a government computer. The SBS database qualifies as such a government program, and, thus, any access is access of a "government computer." Pardeau testified although he could not know Defendant "physically, personally" submitted information to the SBS system, there is substantial circumstantial evidence to withstand Defendant's motion to dismiss. To upload the monthly reports, a unique user name and password must be used, and Defendant's unique user name and password were used to access SBS. Additionally, Defendant's email "was utilized" to submit the reports, which Defendant signed. Even if we were to accept Defendant's argument he only transmitted information then uploaded by the Department of Insurance's personnel, the statute not only covers accessing, but also if Defendant caused the government computer "to be accessed[.]" N.C. Gen. Stat. § 14-454.1 (a). Thus, his argument is unavailing.[13]

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13. Defendant also alludes to the possibility of an employee of his uploading the information. However, as stated *supra*, the statute encompasses when a person causes, directly or indirectly, a computer to be accessed. N.C. Gen. Stat. § 14-454.1 (a). Additionally, the

Finally, at oral argument, Defendant contended the intent of the statute could not be the mere submission of information. He argued the General Assembly wanted actual interaction with a government computer. However, the plain language, with the inclusive language of "access or cause to be accessed" and "directly or indirectly" dispel Defendant's contention. Accordingly, we hold the trial court did not err in denying Defendant's motion to dismiss the accessing a government computer charge.[14]

C. Double Jeopardy

[3] On appeal, Defendant argues the State violated his right against double jeopardy by charging him for both obtaining property by false pretenses and accessing a government computer.

"Constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004). Rule 10 (a)(1) requires Defendant to make "a timely request, objection, or motion, stating *the specific grounds* for the ruling the party desired the court to make[.]" N.C. R. App. P. 10 (a)(1) (2017) (emphasis added).

Our review of the record shows Defendant failed to bring forth this argument at the trial level. While Defendant argued some of the crimes charged violated his right against double jeopardy, he based his arguments on the civil action revoking his licenses, which arose from the same actions giving rise to the criminal charges. Defendant brought forth no argument about a lesser included offense to the trial court. Consequently, the trial court could not make a determination on whether the crime of obtaining property by false pretenses is a lesser included offense of accessing a government computer for unlawful purposes. Accordingly, Defendant failed to preserve this argument for appellate review, and we dismiss this argument.

D. Falsifying Monthly Bail Bond Report Information Charge

[4] Defendant next contends the State failed to present sufficient evidence he violated N.C. Gen. Stat. § 58-71-165 (2017) and, thus, the court

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State presented sufficient evidence of access, either directly or indirectly, by Defendant to withstand his motion to dismiss.

14. At trial and at oral argument, though not directly in his brief, Defendant argued the SBS system is not a government computer. N.C. Gen. Stat § 14-453 (7a) defines a "Government computer" as "any computer, computer program, computer system, computer network, or any part thereof, that is owned, operated, or used by any State or local governmental entity." N.C. Gen. Stat. § 14-453 (7a) (2017).

erred in denying his motion to dismiss. He contends the missing information in the reports, as alleged, "strongly suggests these omissions were clerical errors committed by [his] staff."

We conclude the State presented substantial evidence to withstand Defendant's motion to dismiss this charge. The State presented evidence of the false reports, Defendant signing the attestation clause certifying he submitted true information, and the reports being filed via the SBS system. The question of fact—whether the omissions were fraud or clerical errors—was one to be determined by the jury. Accordingly, we hold the trial court did not err in denying Defendant's motion to dismiss this charge.

E. Obtaining Property by False Pretenses Charge

[5] On appeal, Defendant argues the State failed to submit sufficient evidence of "causation" between the false representation and the obtaining of something of value. Defendant's argument is two-fold. First, he contends the only evidence of causation is the testimony from the State's witness, Timothy Pardeau. He argues this evidence, alone, is insufficient to show he "had a motive, plan or scheme which was intended to enable him to obtain a bail bond license which he already held." Second, Defendant argues he did not *obtain* anything of value, as he already had a bondsman license.

N.C. Gen. Stat. § 14-100 states:

> If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony . . . .

N.C. Gen. Stat. § 14-100 (a) (2017).

Black's Law Dictionary defines "obtain" as, *inter alia*, "To bring into one's own possession; to procure . . . ." *Black's Law Dictionary* 1247 (10th ed. 2014). Black's defines "retain" as, *inter alia*, "To hold in possession or under control; to keep and not lose, part with, or dismiss." *Id.* at 1509. Additionally, Webster's defines "obtain" as, *inter alia*, "to get possession of, esp. by some effort; procure[.]" *Merriam Webster's New*

World College Dictionary 1010 (5th ed. 2014). Webster's defines "retain" as, *inter alia*, "to hold or keep in possession" and "to continue to have or hold[.]"[15] *Id.* at 1240.

The indictment for obtaining property by false pretenses states:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud obtain and attempt to obtain a Professional Bail Bondsman's License issued by the North Carolina Department of Insurance . . . ."

Both Defendant and the State agree at the time of the alleged acts, Defendant already had his bail bondsman license. The State likens obtaining to retaining. At oral argument, the State asserted "retaining wrongfully is obtaining." The State also contended obtaining a renewal may be obtaining. We disagree.

We conclude the State failed to produce sufficient evidence Defendant *obtained* a professional bail bondsman's license. Defendant received—*obtained*—his license on 26 February 1998. The indictment for this charge lists the dates of offense as 1 July 2009 to 1 July 2014. The State presented no evidence of Defendant's actions prior to 26 February 1998 at trial, and even if it had, there would be a fatal variance between the indictment and the evidence at trial.

While the State likens "retaining" to "obtaining," we conclude retain is not within the definition of obtain. We note, the Department of Insurance has different processes and requirements for *obtaining* a bail bondsman license and *renewing* (retaining) a license. Additionally, the State's assertion at oral argument—Defendant obtained a renewal—is not what the State alleged in the indictment. Instead, the indictment states Defendant obtained "a Professional Bail Bondsman's License", not a "*renewal* of a Professional Bail Bondsman's License."[16] Thus the trial court erred by denying Defendant's motion to dismiss the obtaining

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15. Additionally, in the Legal Thesaurus, "obtain" and "retain" are not listed as synonyms of each other. *Legal Thesaurus* 357, 454 (2d ed. 1992).

16. At oral argument, the State also contended "attempting to obtain" a license is equivalent to obtaining. While attempting to obtain property is within the crime of obtaining property by false pretenses, the inclusion of "attempt" does not bring "retaining" within the definition of "obtaining."

property by false pretenses charge.[17] *State v. Hinton*, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007) (citation omitted) ("In construing ambiguous criminal statutes, we apply the rule of lenity, which requires us to strictly construe the statute.").

F. Selective Prosecution

[6] Finally, Defendant brings forth a selective prosecution argument. He contends: (1) the trial court erred in sustaining the State's objection during his questioning of Wayne Goodwin; and (2) regardless of the court's error, he presented a *prima facie* showing of selective prosecution.

To demonstrate selective prosecution Defendant must:

> first, . . . make a *prima facie* showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not; second, after doing so, he must demonstrate that the discriminatory selection for prosecution was invidious and done in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

State v. Pope, 213 N.C. App. 413, 416, 713 S.E.2d 537, 540 (2011) (citation and quotation marks omitted).

As included above, during Goodwin's testimony, Defendant began to question Goodwin on the background of the charges at issue, and the State objected. The court allowed Defendant to make a proffer before ruling on the objection. After six questions, the court interrupted, stating it had "difficulty" seeing how the testimony was relevant to the issues at trial. The court stated "if you wish to ask him some questions that would make this relevant, I'd be happy to consider it but I frankly don't hear that yet." Defendant replied, "Your Honor, without going through a bit more I would just say I'm good with that and I'll be done with this witness." Defendant asked the court if he could ask one more question, which

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17. Lastly, at oral argument, Defendant contended were this obtaining property by false pretenses charge to "fall", the trial court should have also dismissed the other charges. However, the indictment for the unlawfully accessing a government computer charge states Defendant obtained not only a license, but also "money and fees (premiums) charged in connection with the bonding of individuals[.]" Additionally, the falsifying monthly bail bond report information charge requires no such obtaining. Thus, these charges do not "fall" with the obtaining property by false pretenses charge.

We need not address Defendant's argument about the sufficiency of Pardeau's testimony, as we reverse this charge on other grounds.

the court allowed. Defendant actually asked an additional six questions. Then Defendant stated he was "just going to stop right there[.]" The court sustained the State's objection. Defendant stated he had no more questions for Goodwin before the jury returned. After the jury returned, Defendant did not ask Goodwin any more questions.

First, we conclude the trial court did not erroneously limit Defendant's offer of proof. As stated *supra*, the court directed Defendant to ask questions which would bring forth relevant testimony. Additionally, the court allowed Defendant to ask several more questions of the witness, and Defendant terminated the questioning.

[7] Second, Defendant failed to make a *prima facie* showing of selective prosecution. Defendant points to two of the State's witnesses' testimonies. First, Steve Bryant testified he investigated "approximately 20" other individuals for the "type of alleged activity" at issue. When Defendant asked Bryant how many of the twenty Bryant criminally charged, Bryant answered he did not have the authority to criminally charge anyone. Defendant asked if Bryant knew of criminal investigations resulting from his investigations, and Bryant answered he knew Defendant "as one of them[.]" Additionally, Bryant had not heard or was not aware of others being charged as a result of his investigations. Another witness, Rebecca Shigley, testified she did not know if other bail bondsmen had been charged "for clerical errors on monthly reports" and her division did "not handle any criminal matters." While Defendant characterizes this testimony as proof of "the total lack of prosecutions of bail bondsmen by the Department for intentionally filing false reports[,]" the testimony does not indicate as such. Accordingly, we conclude the trial court did not err.

IV. Conclusion

For the foregoing reasons, we reverse the trial court's denial of Defendant's motion to dismiss the obtaining property by false pretenses charge. We remand the matter for resentencing. We dismiss Defendant's double jeopardy argument and find no error in the rest of the judgments.

NO ERROR IN PART; DISMISSED IN PART; REVERSED IN PART; REMANDED FOR RESENTENCING.

Judges ELMORE and ZACHARY concur.

THOMPSON v. BASS

[261 N.C. App. 285 (2018)]

JANICE THOMPSON, PLAINTIFF
v.
CHRISTOPHER LEE BASS AND DONALD WAYNE BOYD, DEFENDANTS

No. COA17-1194

Filed 4 September 2018

1. Contracts—breach—purchase of business—internet sweepstakes—summary judgment for defendants

The trial court did not err by granting summary judgment for defendants in an action arising from the purchase of an internet sweepstakes business. Plaintiff owned internet sweepstakes in two counties and sought to buy defendant's business in a third. Law enforcement officers shut down the business in the third county after the purchase. Plaintiff acknowledged receiving all of the items she had expected to receive with the purchase and operated the business from its purchase until it was shut down. Plaintiff did not allege the specific provisions breached, nor a single fact constituting a breach with either defendant.

2. Fraud—elements of claim—purchase of business—internet sweepstakes

The trial court did not err by finding that plaintiff buyer's reliance on any misrepresentation or concealment of fact by defendant seller was unreasonable as a matter of law. Plaintiff was well aware of the risks of the internet sweepstakes business and failed to exercise due diligence when she did not inquire of law enforcement about the legality of the business she was purchasing.

3. Appeal and Error—no meaningful argument—unfair trade practices—purchase of business—internet sweepstakes

Plaintiff's claim for unfair and deceptive trade practices in an action arising from her purchase of an internet sweepstakes business was deemed abandoned when she failed to submit any meaningful argument as to how the trial court erred by granting summary judgment for defendants.

4. Appeal and Error—no meaningful argument—civil conspiracy—purchase of business—internet sweepstakes

Plaintiff's claim for civil conspiracy in an action arising from her purchase of an internet sweepstakes business was deemed abandoned when she failed to submit any meaningful argument as to how the trial court erred by granting summary judgment for defendants.

Appeal by plaintiff from order entered 7 June 2017 by Judge G. Wayne Abernathy in Nash County Superior Court. Heard in the Court of Appeals 2 May 2018.

Gay, Jackson & McNally, L.L.P., by Darren G. Jackson, Andy W. Gay, and Daniel Patrick McNally, for plaintiff-appellant.

Etheridge, Hamlett, & Murray, L.L.P., by J. Richard Hamlett, II, and William D. Etheridge, for defendant-appellee Bass.

The Valentine Law Firm, by Kevin N. Lewis, for defendant-appellee Boyd.

ELMORE, Judge.

Plaintiff Janice Thompson appeals from an order granting defendants Christopher Lee Bass and Donald Wayne Boyd's motions for summary judgment on plaintiff's claims for breach of contract, fraud, rescission, unfair and deceptive trade practices, punitive damages, and civil conspiracy arising out of the 2015 sale of an internet sweepstakes business in Nash County.

Because plaintiff has failed to forecast sufficient evidence of a genuine issue of material fact as to any of her claims and thereby withstand defendants' motions for summary judgment, we affirm.

I. Background

As of July 2015, plaintiff had owned and operated three internet sweepstakes businesses one located in Lenoir County and two located in Pitt County for approximately three years. Defendant Bass had owned and operated an internet sweepstakes business located in Nash County for approximately six years, while defendant Boyd was a third-party vendor who supplied defendant Bass with software owned by Aurora Technology, Inc.

On 20 November 2014, plaintiff received a written notification from Lenoir County law enforcement informing her that the games being played on the machines in her business violated N.C. Gen. Stat. § 14-306.4 ("the sweepstakes statute"). The purpose of the notification was to encourage voluntary compliance with the sweepstakes statute and allow those involved in the operation of such businesses "a 'grace period' prior to any enforcement action." Plaintiff sought legal counsel in response to the notification, voluntarily removed certain games

pursuant to the advice of counsel in December 2014, and continued to operate her business. On 3 March 2015, plaintiff received two similar notifications from Pitt County law enforcement. Plaintiff posted on the Facebook page for one of her businesses on 8 May 2015, "I might just let them give me a ticket so I can have my day in court," and on 2 July 2015, "We do not have any plans of closing." On 17 July 2015, Nash County law enforcement left a similar notification with an employee at defendant Bass's business.

On 30 July 2015, plaintiff purchased the Nash County business from defendant Bass for $500,000.00.[1] Defendant Boyd was not present for nor a party to the transaction, as he only supplied software and had no ownership interest in the business itself. Defendant Bass did not inform plaintiff prior to the sale that a notification of enforcement had recently been left at the business, and plaintiff had made no attempt to contact Nash County law enforcement herself to discuss the legality of the business. In her deposition testimony, plaintiff admitted that she had always checked with the chief of police before adding a new game or machine at her other businesses, but stated that she did not contact Nash County law enforcement "[b]ecause [defendant Bass] had been operating for years. He told [her] it was legal." Plaintiff then clarified that defendant Bass's legality representation was in reference to local zoning laws.

On 1 August 2015, plaintiff assumed ownership and operation of the Nash County business, which included entering into her own Aurora Technology software agreement without the involvement of defendant Boyd. On 17 August 2015, Aurora Technology terminated that agreement amidst speculation that all internet sweepstakes businesses located in the Eastern District of North Carolina would soon be raided and potentially shut down at the direction of the U.S. Attorney. When a representative from Aurora Technology informed plaintiff of the same, plaintiff responded by simply replacing the software on her machines. Plaintiff continued to operate the Nash County business despite having been advised by counsel as of December 2014 that the same replacement software violated the sweepstakes statute.

On 11, 16, and 22 September 2015, undercover law enforcement officers entered the Nash County business and observed the games being played on the machines located therein. The Nash County business was then raided and shut down on 28 September 2015, and on 1 October

1. Although the written "Agreement for Sale of Business" shows a total purchase price of $20,000.00, it is undisputed that plaintiff paid $20,000.00 by check and $480,000.00 in cash to defendant Bass.

2015, plaintiff was charged criminally with eight counts of violating the sweepstakes statute.

On 15 October 2015, plaintiff commenced this action by filing an initial complaint against defendant Bass, and she filed an amended complaint adding defendant Boyd as a party on 17 January 2017. In her amended complaint, plaintiff alleged that prior to discussing the possibility of her purchasing the Nash County business,

> and unbeknownst to the Plaintiff, Defendants had been informed by the Nash County Sheriff's Office of their intention to take enforcement action against the [Nash County business]. . . . . At no time during the negotiations process did Defendants ever inform Plaintiff of the pending enforcement action by law enforcement. Instead, they actively hid this material fact from the Plaintiff.

Plaintiff then enumerated claims for breach of contract, fraud, rescission, unfair and deceptive trade practices, punitive damages, and civil conspiracy against defendants.

On 16 February 2017, defendant Bass filed his amended answer to the complaint along with a motion to dismiss plaintiff's claims for breach of contract, fraud, and civil conspiracy pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. On 22 March 2017, defendant Boyd likewise filed his answer to the complaint along with a Rule 12(b)(6) motion to dismiss plaintiff's claims for breach of contract, fraud, and punitive damages. On 19 May 2017, defendants filed their respective motions for summary judgment on all of plaintiff's claims pursuant to Rule 56 of the Rules of Civil Procedure.

Following a 5 June 2017 hearing, the trial court entered an order granting defendants' motions. The order indicated that the trial court,

> having reviewed the pleadings, the admissions, the interrogatories, the depositions with exhibits, other exhibits, and all documents and affidavits filed and submitted to the Court by the defendants and by the plaintiff, and having considered the arguments of counsel for the plaintiff and the defendants, specifically finds (i) that the subject matter of the contract between the plaintiff and the defendant Bass, to wit: an internet sweepstakes business, was an illegal activity in violation of North Carolina law, against the public policy of this State, and cannot be enforced by the Court; (ii) that any reliance by the plaintiff on any

misrepresentation or concealment of material facts by the defendant Bass in the formation of the contract was as a matter of law not reasonable; and (iii) that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law dismissing all claims.

Plaintiff entered timely notice of appeal.

II. Standard of Review

At the outset, we note that the trial court granted both defendants' motions to dismiss pursuant to Rule 12(b)(6) as well as their motions for summary judgment pursuant to Rule 56. However, because the trial court considered matters outside of the pleadings, we limit our review to the trial court's ruling on defendants' motions for summary judgment as to all claims. *See Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E.2d 611, 627 (1979) ("A Rule 12(b)(6) motion to dismiss for failure to state a claim is indeed converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court.").

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). "A party moving for summary judgment satisfies its burden of proof (1) by showing an essential element of the opposing party's claim is nonexistent or cannot be proven, or (2) by showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Belcher v. Fleetwood Enters., Inc.*, 162 N.C. App. 80, 84, 590 S.E.2d 15, 18 (2004) (citation omitted). "Once the movant satisfies its burden of proof, the burden then shifts to the non-movant to set forth specific facts showing there is a genuine issue of material fact as to that essential element." *Id.* at 84-85, 590 S.E.2d at 18. "All facts asserted by the [nonmoving] party are taken as true . . . and their inferences must be viewed in the light most favorable to that party[.]" *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal citations omitted).

III. Analysis

We now address the issue of whether the trial court erred in granting defendants' motions for summary judgment on plaintiff's claims for

breach of contract and rescission, fraud, unfair and deceptive trade practices, and civil conspiracy.[2]

A. Breach of Contract and Rescission

[1] In this portion of her brief, plaintiff focuses entirely on the trial court's finding that the subject matter of the contract at issue was illegal. She asserts that the Nash County business was not illegal as a matter of law, and that its legality was a genuine issue of material fact to be determined by a jury. Regarding her claim for rescission, plaintiff states simply that because her breach of contract claim should have been allowed to proceed, her rescission claim should likewise have been allowed to move forward.

In an action for breach of contract, the complaint must allege (1) the existence of a contract between the parties, (2) the specific provisions breached, (3) the facts constituting the breach, and (4) the damages resulting to the plaintiff from the breach. *Cantrell v. Woodhill Enterprises, Inc.*, 273 N.C. 490, 497, 160 S.E.2d 476, 481 (1968). "The [equitable] remedy of rescission, as opposed to the notion of damage, seeks to undo the transaction and return the parties to their original status." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 256, 507 S.E.2d 56, 65 (1998). "The right to rescind does not exist where the breach is not substantial and material and does not go to the heart of an agreement." *Wilson v. Wilson*, 261 N.C. 40, 43, 134 S.E.2d 240, 243 (1964).

Because plaintiff has failed to meet her burden of showing that a genuine issue of material fact exists as to the essential elements of her breach of contract claim, we conclude that summary judgment on both claims was proper.

In her complaint, plaintiff alleged only that "Defendants' failure to perform has resulted in a material breach of the contract entered into between the Plaintiff and the Defendants." Plaintiff acknowledges elsewhere in the record that she purchased the Nash County business on 30 July 2015, received all of the physical items she had expected to receive along with the purchase, and operated the business from 1 August 2015 until being shut down by law enforcement on 28 September 2015.

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2. Plaintiff's claim for punitive damages cannot stand alone. *See Iadanza v. Harper*, 169 N.C. App. 776, 783, 611 S.E.2d 217, 223 (2005) ("If the injured party has no cause of action independent of a supposed right to recover punitive damages, then he has no cause of action at all." (quoting *Hawkins v. Hawkins*, 101 N.C. App. 529, 532, 400 S.E.2d 472, 474 (1991), *aff'd*, 331 N.C. 743, 417 S.E.2d 447 (1992))).

Nowhere does plaintiff allege the specific provisions breached, nor a single fact constituting breach, by either defendant Bass or Boyd. Moreover, plaintiff has failed to show even the existence of a contract with defendant Boyd, who had no ownership interest in the Nash County business.

Given these undisputed facts, the trial court did not err in granting defendants' motions for summary judgment on plaintiff's breach of contract and rescission claims.

B. Fraud

[2] Plaintiff next contends that she sufficiently alleged each element of fraud, and that the trial court erred in finding her reliance on any misrepresentation or concealment of material facts by defendant Bass in the formation of the contract to be unreasonable as a matter of law.

The essential elements of fraud are (1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; and made with intent to deceive; (3) which does in fact deceive; (4) resulting in damage to the injured party. *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974). "Additionally, any reliance on the allegedly false representations must be reasonable." *Forbis*, 361 N.C. at 527, 649 S.E.2d at 387. "The reasonableness of a party's reliance is a question for the jury, unless the facts are so clear that they support only one conclusion." *Id.*

Here, the undisputed facts are "so clear that they support only one conclusion": that is, that any reliance by plaintiff on defendant Bass's failure to inform her of the notification of enforcement was unreasonable.

At the time plaintiff purchased the Nash County business, she had owned and operated three similar businesses located in nearby counties for approximately three years. She had received three written notifications from law enforcement informing her that all three businesses were in danger of being shut down, and she had sought legal counsel regarding the legality of her gaming software and machines. Thus, when plaintiff entered into the purchase contract with defendant Bass, she was well aware of the risks involved in operating an internet sweepstakes business. In light of her knowledge and experience, plaintiff failed to exercise reasonable due diligence when she did not seek the opinion of law enforcement regarding the legality of the Nash County business prior to purchasing it. Additionally, plaintiff cannot show that her alleged damages were caused by either defendant, as her shut-down and arrest were based on software she had installed herself after being advised by her attorney that the same software was illegal.

Because plaintiff failed to forecast sufficient evidence to support the reasonableness and causation elements of her fraud claim, we conclude that summary judgment on this claim was proper.

C. Unfair and Deceptive Trade Practices

[3] "The elements for a claim for unfair and deceptive trade practices are (1) defendants committed an unfair or deceptive act or practice, (2) in or affecting commerce and (3) plaintiff was injured as a result." *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 439, 617 S.E.2d 664, 671 (2005) (citation omitted).

Plaintiff's entire argument as to her claim for unfair and deceptive trade practices spans two paragraphs and consists of four sentences. The first paragraph sets forth the elements of the claim, and the second paragraph reads as follows:

> " 'Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts. [ ]' " *Bhatti v. Buckland*, 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991) (quoting *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342 (1975)). Therefore, since it was error to dismiss [plaintiff]'s claims for breach of contract and fraud, it was likewise error to dismiss her claim for Unfair and Deceptive Trade Practices.

Error will not be presumed on appeal. "Instead, the ruling of the court below in the consideration of an appeal therefrom is presumed to be correct." *Beaman v. Southern R. Co.*, 238 N.C. 418, 420, 78 S.E.2d 182, 184 (1953) (citations and internal quotation marks omitted). Moreover, it is the appellant's burden to show error occurring at the trial court, and it is not the role of this Court to create an appeal for an appellant or to supplement an appellant's brief with legal authority or arguments not contained therein. *See, e.g.*, *Eaton v. Campbell*, 220 N.C. App. 521, 725 S.E.2d 893 (2012) (dismissing appeal taken by *pro se* appellants who offered limited and unsupported arguments in requesting relief). Accordingly, if an argument contains no citation of authority in support of an issue, the issue will be deemed abandoned. *See State v. Sullivan*, 201 N.C. App. 540, 550, 687 S.E.2d 504, 511 (2009).

Because plaintiff has failed to submit any meaningful argument as to how the trial court erred in granting summary judgment on her unfair and deceptive trade practices claim, this issue is deemed abandoned on appeal.

D. Civil Conspiracy

[4] Similar to her argument regarding unfair and deceptive trade practices, plaintiff's argument as to her claim for civil conspiracy relies entirely on her claim for fraud. Plaintiff vaguely asserts that defendants "agreed to commit this fraud" and that plaintiff was "greatly damaged" as a result.

Because plaintiff has failed on appeal to submit any meaningful argument as to how the trial court erred in granting summary judgment on her civil conspiracy claim, this issue is also deemed abandoned.

IV. Conclusion

Plaintiff failed to meet her burden to set forth specific facts and forecast sufficient evidence of a genuine issue of material fact as to any of her claims. Accordingly, the order of the trial court granting defendants' motions for summary judgment on plaintiff's claims is hereby:

AFFIRMED.

Judges TYSON and ZACHARY concur.

LARA G. WEAVER, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA17-828

Filed 4 September 2018

1. Public Officers and Employees—State employee—promotion not received—qualifications—findings

The administrative law judge did not err by finding that an unsuccessful applicant for a State job lacked the minimum qualifications in that she did not have supervisory experience. Even though petitioner had taken on more responsibility at times and had done a portion of the supervisor's work, she had no official managerial or supervisory role and did not evaluate, hire, or fire employees. Although petitioner pointed toward "or equivalent" language in the posting, there were several versions of the posting and the person who wrote the knowledge, skills, and ability portion of the job

description testified that this portion of the job description never stated that an equivalency would be acceptable.

2. Public Officers and Employees—State employee—unsuccessful applicant—qualifications—findings

The administrative law judge did not err in a proceeding by a State employee who unsuccessfully sought a job promotion by finding that the focus on filling the position was more on the supervisory and managerial aspects of the position than the technical aspects. Also, testimony that someone was promoted to a supervisory position without supervisory experience was based on a ten-year-old hiring decision.

3. Evidence—hearsay—credentials of successful job applicant—business records exception

The administrative law judge did not err in an action by a State employee who was an unsuccessful candidate for a State job by admitting the successful applicant's credentials, which were presented on notes and paper the hiring officials had compiled. The evidence showed that the job applications and other information about applicant qualifications were kept in the course of a regularly conducted business activity. The focus was on the authentication of the records, including the information collected as part of the regular hiring process, not on who made them.

4. Public Officers and Employees—State employee—priority consideration—minimum qualifications

An administrative law judge did not err by concluding that a State employee (petitioner) who was an unsuccessful candidate for a State job did not have substantially equal qualifications to the successful applicant. Moreover, petitioner did not meet the minimum qualifications for the job and did not qualify for priority consideration.

Appeal by petitioner from final decision entered 12 April 2017 by Judge J. Randall May in the Office of Administrative Hearings, Johnston County. Heard in the Court of Appeals 21 February 2018.

Schiller & Schiller, PLLC, by David G. Schiller, for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph E. Elder, for respondent-appellee.

STROUD, Judge.

Petitioner appeals from a final decision of the Office of Administrative Hearings ("OAH") which concluded that petitioner failed to prove by a preponderance of the evidence she was significantly better qualified for a position with respondent North Carolina Department of Health and Human Services ("NCDHHS") than the selected candidate, because she did not meet the minimum requirements for the position. On appeal, petitioner raises issue with several findings and argues that the Administrative Law Judge ("ALJ") erred in concluding that she did not have substantially equal qualifications as the selected candidate. After review, we affirm the final decision.

Background

Petitioner began working for NCDHHS in January of 2005 in the Microbiology Unit of the State Laboratory of Public Health. She held the position of a Laboratory Specialist and worked on the Special Bacteriology bench in the lab, one of many benches within the lab on which petitioner was trained. Petitioner worked for the State Lab for 11 years.

In January 2015, petitioner applied for a Medical Laboratory Supervisor II position, and when she applied she was a career state employee. Dr. Samuel Merritt, the former unit supervisor for the Microbiology Unit with over 30 years of experience in laboratory work, was assigned as the hiring manager for the Medical Supervisor II position. He assessed petitioner's application. While he found she had much experience with the day-in and day-out routine of the lab and its benches, she had no supervisory experience in the job she held at the lab. Dr. Merritt, therefore, did not find her to be the best fit for the job amongst the other applicants who applied for the role of Medical Supervisor II. Dr. Merritt also reviewed Thomas Lawson's application. Mr. Lawson was not a State employee when he applied but he possessed the educational, work experience, and supervisory requirements that the hiring committee found necessary to perform the job. He had a supervisory role in a public health lab in Maryland overseeing six to twelve employees. He also had conducted testing in microbiology which was of clinical importance. Lawson had a degree in biology and a Master's degree in biotechnology. Given the totality of Lawson's application, the hiring officials considered him to be the best candidate out of the applications received. After conducting interviews, Merritt informed Lawson he was selected for the job, and Lawson started his role as Medical Supervisor II in May of 2016.

On 1 November 2016, petitioner filed her petition with the Office of Administrative Hearings, arguing that NCDHHS failed to give petitioner promotional priority over a less qualified applicant who was not a career State employee and that she should have been given veteran's preference because she was the spouse of a disabled veteran. A hearing on the matter was heard before the ALJ on 14 and 15 February 2017. Following the hearing, on 12 April 2017, the ALJ entered his final decision, concluding that petitioner failed to prove by a preponderance of the evidence she was significantly better qualified for the position than the selected candidate and that she did not meet the minimum requirements for the position, so she was not qualified for veteran's preference. Petitioner timely appealed to this Court.

Analysis

On appeal, petitioner contends that the ALJ erred in making numerous findings and in concluding that she did not have substantially equally qualifications as the selected candidate, Mr. Lawson.

I. Standard of Review

"N.C. Gen. Stat. § 150B-51 (2015) governs the scope and standard of this Court's review of an administrative agency's final decision. The standard of review is dictated by the substantive nature of each assignment of error." *Watlington v. DSS Rockingham County*, __ N.C. App. __, __, 799 S.E.2d 396, 400 (2017) (citations omitted). Under North Carolina General Statutes § 150B-51(b):

> The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.
>
> . . . With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court

> shall conduct its review of the final decisions using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(b)-(c) (2017). Thus,

> [i]t is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test. The court engages in *de novo* review where the error asserted is pursuant to § 150B-51(b)(1), (2), (3), or (4).

Watlington, __ N.C. App. at __, 799 S.E.2d at 400 (citations and quotation marks omitted).

> Under the whole record test, [t]he court may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence -- that which detracts from the agency's findings and conclusions as well as that which tends to support them -- to determine whether there is substantial evidence to justify the agency's decision. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion.

Harris v. NC Dept. of Public Safety, __ N.C. App. __, __, 798 S.E.2d 127, 133 (citation, quotation marks, and brackets omitted), *aff'd per curiam*, 370 N.C. 386, 808 S.E.2d 142 (2017).

II. Lack of Minimum Qualifications for the Supervisor II Position

[1] Petitioner first argues that the ALJ erred in making these findings related to whether petitioner had the necessary supervisory experience for the position:

> 23. The minimum education and experience requirements for the MLS II position required the successful candidate to have a Bachelor's degree in medical technology, chemistry, or biological science, and four years of laboratory experience, one of which is in a supervisory capacity.

> 24. The [Knowledge, Skills and Abilities (KSAs)] for the MLS II position required the successful applicant to have a background in microbiology, including basic lab methods for cultivating and identifying microorganisms and microscopic analysis. As the hiring manager, Dr. Merritt developed the KSAs required for the MLS II position.
>
> . . . .
>
> 29. The KSAs established by the hiring manger specifically required the successful candidate to have supervisory and management experience. Petitioner testified that she did not have such experience; therefore, she did not meet the minimum qualifications for the Med Lab Supervisor II position.
>
> 30. Though petitioner initially indicated that she had supervisory experience on her application, her own testimony made it clear that she did not have this minimum experience.
>
> 31. Petitioner's application was initially screened into the pool of minimally qualified applicants because she inaccurately stated in her application that she had supervisory experience. Upon review by Dr. Merritt, who was familiar with her work, an appropriate determination was made that Petitioner did not meet the minimum job qualifications because she did not have the required management and supervisory experience.
>
> . . . .
>
> 40. Petitioner was not included in the most qualified pool of candidates. She did not have the necessary laboratory experience in a supervisory and management capacity.

Petitioner contends that the ALJ erred in making the above findings of fact regarding her experience and lack of a supervisory role at the lab. Ultimately, the ALJ found that her experience as a Lab Tech in the State lab for 11 years, paired with her education, without any managerial role, did not amount to the minimum requirements for the job posting.

Petitioner argues that she covered several other benches during the months between when the position became vacant and was filled and that the hiring committee did not properly weigh the evidence of her supervisory role in the lab. She argues that she "checked the work of the people on the other benches in the unit" and had to write her own evaluations and conduct monthly quality control. Thus "when [petitioner]

applied for the Supervisor II position, she had been trained on all the benches in the Microbiology Unit, could work all of them, and had done quality control on all of the benches." But even if petitioner did take on more responsibility with that vacancy, she still had no official managerial or supervisory role. She did a portion of the work a supervisor would do, such as overseeing the work on the benches, but she did not hire or fire employees.

When asked at the hearing whether she ever held a position with a supervisory title to it, petitioner responded, "No." Petitioner was again asked "[d]id you have two years of supervisory experience at the time you applied?" and she responded, "No." And petitioner acknowledged at the hearing that she made no hiring decisions in her position and that she had never been assigned to evaluate other employees or evaluated other employees. But on her application, when asked whether she had supervisory and management experience, petitioner wrote "Yes." This evidence supports the findings as entered by the ALJ -- and in turn provides substantial evidence to justify the agency's final decision that petitioner did not meet the minimum qualifications for the position as posted. *See Harris*, __ N.C. App. at __, 798 S.E.2d at 133.

Petitioner also contends that the ALJ ignored the full text of the job description, because the description included the language "or an equivalent combination of education and experience." There were apparently several versions of the job posting listed in various places at different times, but petitioner argues that all versions contained this equivalency language. For example, petitioner's Exhibit 4 refers to a job bulletin posting for the position which listed as minimum education and experience requirements a "Bachelor's degree . . . and four years of laboratory experience in the assigned area, one of which is in a supervisory capacity; or an equivalent combination of education and experience[.]" Petitioner's Exhibit 8 indicated that the "Education and Experience Required" section of the job posting for the position stated:

> Preferably graduation from a four-year college or university with a B.A./B.S. or equivalent degree in medical technology, microbiology, or biological sciences. And three years of supervisory laboratory experience, preferably microbiology-related.
>
> Alternatively, an equivalent combination of education and experience that includes an Associate degree in medical technology, microbiology or microbiology-related. Coursework must include at least one class in general

> microbiology or basic medical microbiology. Additional courses in biochemistry, chemistry, biology, immunology, or microbiology are preferred.
>
> Continuing education courses in any of the above subjects would also be beneficial.
>
> Position requires a background in microbiology with at least 3 years of work experience in supervision and management. . . .

But petitioner has not shown that the trial court's findings regarding her experience as it related to that required for the position were erroneous. Petitioner's application erroneously stated that she had supervisory experience. She later testified that she has never held a supervisory title. Moreover, Dr. Merritt testified that he wrote the knowledge, skills, and ability section ("KSAs") of the job description, and that portion of the job description never stated an equivalency would be acceptable. The KSA was consistently written to reflect a requirement that the applicant have knowledge and background "in supervision and management." The ALJ did not err in ultimately concluding that petitioner did not meet this requirement. The trial court's findings are supported by the evidence. *See, e.g.*, *Teague v. Western Carolina University*, 108 N.C. App. 689, 692-93, 424 S.E.2d 684, 686-87 (1993) ("The evidence presented in the case at hand does not lead this Court to the conclusion that the Commission's decision to uphold Mr. McClure's determination was patently in bad faith or whimsical. Mr. McClure had to make his decision based on the qualifications he found in the applications and elicited during the interviews. Ms. Teague's application did not state that she held an advanced degree, nor did it contain any references to her relevant and substantial experience. . . . Based upon the information he had before him, Mr. McClure reasonably concluded that Ms. Teague's qualifications were not 'substantially equal' to Ms. Murchison's." (Citation and quotation marks omitted)).

III. Additional Findings Regarding Required Supervisory Experience

[2] Petitioner also contends that the ALJ erred in making these findings, Findings of Fact No. 34, 39, and 45, in relation to the qualifications sought for the position:

> 34. The MLS II position has both technical and supervisory aspects; however, the supervisory responsibilities are primary and present in the other responsibilities of the job. While the MLS II would perform some lab testing, this was not the expected primary role. Specialists are the

> subject matter experts and expected to perform the bench testing and to trouble shoot issues arising on the bench. The MLS II would oversee and coordinate these activities.
>
> . . . .
>
> 39. At the time Dr. Merritt was hiring for the MLS II position, he was looking for a candidate with previous supervisory experience. While the candidate needed broad knowledge of the testing areas that would be supervised, the candidate did not need to be an expert in performing the various tests.
>
> . . . .
>
> 45. Shadia Rath was hired as a Med Lab Supervisor II without prior supervisory experience. This was in the bioterrorism area that was previously part of the microbiology unit. Rath served in this position during 2004-2007, nine years prior to the posting of the position at issue in this case. The fact that she was hired nine years ago, by a different supervisor into a different Med Lab Supervisor II position, is not relevant to a determination of whether Petitioner met the minimum qualifications for the Med Lab Supervisor II position at issue in this case.

In relation to Finding of Fact No. 34, testimony from Dr. Merritt and Dr. Scott Zimmerman supported the ALJ's finding that the focus in filling the Supervisor II position was on the supervisory and managerial aspects of the position, more so than the technical aspects. And this was reflected in the job posting description, which reiterated a need for supervisory and management experience. Finding of Fact No. 39, which focuses specifically on what Dr. Merritt was looking for in candidates, again reiterates the need for supervisory experience. This finding is supported by his testimony.

On Finding of Fact No. 45, Ms. Rath testified that she served in a Supervisory II position from 2004 to 2007. She also testified that when she was promoted to the Supervisor II position, she had never held a supervisory title. But Ms. Rath was hired almost a decade earlier, by someone other than Dr. Merrit, and no evidence was presented of the job posting for the Supervisor II position at the time she applied or whether it listed a requirement of prior supervisory experience. Therefore, we hold these findings are supported by substantial evidence.

IV. Business Records Exception to Hearsay

[3] Petitioner next contends the ALJ erred in making findings of fact No. 28, 43, and 46 -- which pertain to Mr. Lawson's credentials -- because they are based on hearsay. Petitioner argues that Lawson's credentials are all hearsay because the credentials were presented on notes and paper the hiring officials -- including Dr. Merritt -- compiled during Lawson's interview for the Medical Supervisor II job. The ALJ found as fact:

> 28. Thomas G. Lawson met the minimum education requirements as he has a Bachelor's degree in biology and a Master's degree in biotechnology. Lawson also had several years of laboratory experience in a supervisory capacity. This exceeded the MLS II position requirement for at least a year of laboratory experience in a supervisory capacity.
>
> . . . .
>
> 43. Review of Lawson's application revealed that he exceeded the minimum qualifications for the MLS II position:
>
> > a. Lawson oversaw the laboratory operations for a clinical and environmental testing laboratory. He designed, implemented, and managed components for quality assurance programs.
> >
> > b. Lawson developed and maintained standard operating procedures; competency assessment for testing; proficiency testing; corrective action reporting; specimen turnaround time optimizations; compliance auditing; and new assay performance verification.
> >
> > c. Lawson hosted and directed federal auditors during Clinical Laboratory Improvement Amendment inspections.
> >
> > d. Lawson was involved in budgeting activities and established relationships within the biotech industry. He communicated with stakeholders, public health officials, vendors, and news media.
> >
> > e. Lawson conducted recruitment, selection, and orientation procedures for new employees; conducted employee performance evaluations; and managed

> employee promotions and discharges. Lawson provided technical oversight and training of between 6 and 12 scientists in several testing areas.
>
> f. Lawson had several years of testing experience as a microbiologist. He conducted molecular testing for the detection of bio-threat agents and infectious organisms. He performed quality control for testing he conducted. He worked as a senior microbiologist at the Texas Department of State Health Services performing biological tests to detect infectious organisms using testing techniques utilized in the SLPH.
>
> . . . .
>
> 46. Lawson was offered the MLS II position and he accepted the offer. He started in the MLS II position in May 2016. Lawson was not a career state employee of the State of North Carolina at the time he was hired into the MLS II position. Dr. Merritt, in conjunction with the interview team, concluded that Lawson was the most qualified candidate; and that he was significantly better suited to the position than Petitioner. Lawson possessed the laboratory experience in a supervisory and management capacity that Petitioner did not have.

At the OAH hearing, petitioner objected several times to the admission of evidence regarding Lawson's credentials, arguing this evidence was hearsay because Mr. Lawson was not present to testify. Hearsay is defined as, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2017). "However, statements offered for other purposes are not hearsay." *Taylor v. Abernethy*, 174 N.C. App. 93, 99, 620 S.E.2d 242, 246 (2005) (citations, quotation marks, and brackets omitted). Also, hearsay evidence may be admissible if it falls under one of the exceptions to the hearsay rule listed in North Carolina Rules of Evidence Rule 803. *See* N.C. Gen. Stat. § 8C-1, Rule 803 (2017). Business records are one such exception. *See, e.g.*, N.C. R. Evid. Rule 803 (6) ("The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (6) Records of Regularly Conducted Activity.").

Here, the ALJ overruled Petitioner's objection based upon the "records of regularly conducted activity" exception to the hearsay rule

because Mr. Lawson's job application and the hiring officials' notes taken during the interview about Lawson's credentials were business records kept as a part of the usual hiring process. As noted above, records of regularly conducted activity are addressed in Rule 803(6), which states,

> A memorandum, report, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if (i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit or by document under seal . . . made by the custodian or witness, unless the source of information or the method or circumstances or preparation indicate lack of trustworthiness.

Id.

NCDHHS presented several exhibits which petitioner claims are inadmissible hearsay, including Mr. Lawson's application for the job and interview notes, which also include information on his credentials and experience. Petitioner's first objection came after Ms. Shanda Snead began testifying about Mr. Lawson's education based upon his job application. Ms. Snead was the "recruiter for Public Health," a department within NCDHHS that includes the State Lab of Public Health. Her job was to

> work with the hiring managers when there's a vacancy or a new position that needs to be filled. In going through that process, I would create the posting, working with the applicant tracking system, requesting -- receiving the applications, reviewing them, screening them, and then sending them the qualified applicants and then following up with them later on if there's questions with the hiring, interview process.

She testified about the usual process used by NCDHHS for hiring, including the entire process of posting the job, collecting information on the applicants, screening the applicants, and selecting the applicant. The information is collected in the "NEOGOV system[,]" which is an electronic system. She would then screen the applications for minimum qualifications, and those that met the minimum job qualifications would be transmitted to the hiring manager, who is normally the supervisor

who will decide which applicants to interview and ultimately hire. She described specifically the job posting for the position at issue in this case, as well as the receipt and screening of the applications, including those from Mr. Lawson and petitioner. Both of these applications were collected and transmitted to the hiring manager -- in this case, Dr. Merritt -- in the usual manner.

Petitioner objected to this testimony and the job application as hearsay because "Mr. Lawson is not here to verify and -- which statement -- call for the truth of the matter, sir." Counsel for respondent noted that the job application was admissible hearsay under the business records exception. He noted that the application and information submitted to the hiring manager comes from the applications submitted by the applicants through the NEOGOV system.

> Business records made in the ordinary course of business at or near the time of the transaction involved are admissible as an exception to the hearsay rule if they are authenticated by a witness who is familiar with them and the system under which they are made. The authenticity of such records may, however, be established by circumstantial evidence. There is no requirement that the records be authenticated by the person who made them.

State v. Wilson, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985) (citations omitted).

The evidence here showed that the job applications and other information about the qualifications of the job applicants, including Mr. Lawson, were "(i) kept in the course of a regularly conducted business activity," N.C. R. Evid. 803(6), specifically, NCDHHS's process for posting new jobs and hiring new employees. "[I]t was the regular practice of" NCDHHS to collect applications in the NEOGOV system and to use this data compilation to make the hiring decisions. *See id.* Ms. Snead was a "custodian or other qualified witness" who testified about the business practice of collecting the applications and transmitting them to the hiring manager. *Id.* Therefore, the ALJ correctly overruled petitioner's objection based on hearsay, since Mr. Lawson's application and the other records regarding his qualifications were business records admissible under Rule 803(6). *Id.*

This situation is similar to *State v. Cagle*, 182 N.C. App. 71, 76, 641 S.E.2d 705, 709 (2007), where the Director of Security for Biltmore Mall testified about the Mall's "procedures and processes for handling problematic checks" in a prosecution for obtaining property by

writing worthless checks. The defendant objected to her testimony about the worthless checks since "she did not witness their processing at the bank." *Id.* But this Court held that her testimony about the bad checks was admissible under Rule 803(6) because she testified about "the Mall's handling of the checks" based upon her first-hand knowledge of the Mall's procedures. *Id.*

The same analysis would apply to the interview notes taken during Mr. Lawson's interview for the job. These notes were a "memorandum, report, record, or data compilation" of the "opinions" of the interviewer "made at or near the time" of the interview, and it was also part of the regular practice of NCDHHS to keep a record of the interview notes. *See* N.C. R. Evid. 803(6). In addition, essentially the same information was included in the interview notes as in Mr. Lawson's application. *See generally Thanogsinh v. Board of Educ.*, 462 F.3d 762, 775-76 (7th Cir. 2006) ("The district court abused its discretion when it excluded the interviewers' score sheet from Cain's interview and the handwritten notes on that sheet. This document is admissible under the business record exception to the hearsay rule. . . . In this case, Cain's score sheet is precisely the type of memorandum or record that falls within the ambit of the business record exception." (Citations, quotation marks, and footnote omitted)).

Petitioner contends that when Mr. Lawson completed his application, he did not work for NCDHHS, so any document he created could not fall under the business record exception to the general rule of exclusion of hearsay. But the focus is not on Lawson's position, but on the authentication of the records, including the information collected by NCDHHS as part of its regular hiring process. "There is no requirement that the records be authenticated by the person who made them." *Wilson*, 313 N.C. at 533, 330 S.E.2d at 462. Petitioner's argument that Mr. Lawson did not create the record has the same flaw as the defendant's argument in *Cagle*, as noted above, that the Mall Directory of Security "did not witness" the processing of the checks at the bank. *Cagle*, 182 N.C. App. at 76, 641 S.E.2d at 709. Petitioner has not noted any reason for exclusion of this information on the theory that "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." N.C. R. Evid. Rule 803(6). In addition, Dr. Merritt's interviews were taken in the usual course of his role as hiring manager to interview applicants for the open position. Dr. Merritt made a "data compilation" of his "opinions" regarding the qualifications of the applicants, including Mr. Lawson, "at or near the time" of the interview, and these were kept as part of the "regular practice" of NCDHHS to keep

records of the hiring process. *Id.* Both Dr. Merritt and Ms. Snead testified at length about this process. Therefore, the ALJ correctly overruled Petitioner's objection to the testimony and evidence regarding Mr. Lawson's qualifications as they were shown on his application and as reflected in Dr. Merritt's interview notes when he was making the hiring decision. In addition, the ALJ's findings of fact regarding Mr. Lawson's credentials and experience were supported by the record.

V. Substantially Equal Qualifications

[4] Finally, petitioner argues that the ALJ erred in concluding that she did not have substantially equal qualifications as Mr. Lawson and in failing to give her priority consideration as a career State employee for the position. Because we have concluded that the ALJ did not err in finding that petitioner failed to meet the minimum qualifications for the position, she also did not qualify for priority consideration. Therefore, it was not error for the ALJ to decline to give her priority consideration as a career State employee, as an employee must meet the minimum qualifications for the position for the priority to apply. *See* 25 N.C.A.C. 01H.0635(a) ("The employee or applicant must possess at least the minimum qualifications set forth in the class specification of the vacancy being filled.").

Conclusion

We affirm the final decision of the Office of Administrative Hearings.

AFFIRMED.

Judges DAVIS and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 SEPTEMBER 2018)

CHAPMAN v. PIMENTEL No. 18-121	Wake (15CVD6673)	Vacated and Remanded
IN RE A.C-M. No. 18-154	Alexander (14JT28-29)	Affirmed
IN RE A.S. No. 18-120	Cumberland (17JA60-66)	Affirmed
IN RE B.D. No. 18-288	Chatham (16JT35) (16JT36)	Dismissed in Part; Affirmed in Part.
IN RE C-R.D.G. No. 18-148	Mecklenburg (15JA4)	Reversed and Remanded
IN RE D.D. No. 18-438	Mecklenburg (15JT671) (15JT672)	Affirmed
IN RE D.K. No. 17-1338	Onslow (16JB355)	Reversed
IN RE ESTATE OF QUATTLEBAUM No. 17-591	Brunswick (14E929)	Affirmed
IN RE F.A.M. No. 18-284	Onslow (16JT365)	Affirmed
IN RE J.D.S. No. 18-153	Mecklenburg (15JT192-193)	Affirmed
IN RE J.E. No. 17-1345	Mecklenburg (16JRI8)	Affirmed
IN RE L.J. No. 17-1431	Robeson (15JT197-198)	Vacated and Remanded
IN RE M.J.J.M. No. 18-289	Buncombe (14JT224)	Affirmed
IN RE T.E.G. No. 18-336	Gaston (16JT33)	Vacated and Remanded
IN RE T.L.S. No. 18-278	Sampson (16JA48-51)	Affirmed in Part and Reversed in Part

NORTH v. McRAE No. 17-698	Richmond (16CVS653)	Affirmed
SLADE v. PETTY No. 17-1276	Alamance (15CVS911)	Affirmed
STATE v. CHISHOLM No. 18-23	Mecklenburg (15CRS243049) (15CRS243051)	No Error
STATE v. DRAVIS No. 18-76	Wake (16CRS208474)	Reversed
STATE v. HAYES No. 17-1420	Rowan (16CRS2357) (16CRS51544) (16CRS51546)	No Error
STATE v. JOHNSON No. 17-1306	Cumberland (13CRS50796)	No Error
STATE v. KEELS No. 18-170	Wake (16CRS213363-64)	Dismissed
STATE v. LOCKLEAR No. 17-1332	Johnston (16CRS51182) (16CRS51228)	No error in part, dismissed in part
STATE v. MALDONADO No. 17-643	Durham (15CRS2646-47) (15CRS55558-59)	No Error
STATE v. MILLER No. 16-424-2	Guilford (14CRS71249)	Dismissed
STATE v. MILLER No. 16-1206-2	Guilford (13CRS89957)	No Error
STATE v. PEREZ No. 17-759	Buncombe (11CR59960) (16CR85332)	Affirmed
STATE v. STRICKLAND No. 17-938	Surry (13CRS54409-10) (16CRS764)	No Error
STATE v. VALLEJO No. 17-1292	Wake (14CRS224764) (14CRS224766) (15CRS52-55)	No Error

STATE v. WALKER No. 17-1167	Henderson (15CRS54765)	No Error
STATE v. WALTON No. 17-1359	Chowan (14CRS50403-04)	Reversed; Remanded
STATE v. WATSON No. 17-833	Johnston (16CRS53002-04)	Vacated in part; Dismissed in part; Affirmed in part; No error in part.
STATE v. WESTBROOK No. 18-32	Forsyth (16CRS57045)	Reversed
STATE v. WHITE No. 18-39	Durham (14CRS56324)	Reversed
STATE v. WHITE No. 18-36	Carteret (15CRS53113)	No error in part; No plain error in part.

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